Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine

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I. INTRODUCTION

Kate files a class action in federal court, alleging that her former employer violated Title VII of the Civil Rights Act of 1964 by engaging in a pattern of racial discrimination. When Kate accepted her job, however, she agreed to arbitrate all future claims against the company. This contract features a cost-splitting provision that requires Kate to pay half of the arbitration's expenses, a loser-pays clause that allows the arbitrator to award the prevailing party its attorneys' fees, a pay-your-own-way term that overrides any attorneys' fees award that would be available to Kate, and a class-arbitration waiver that requires Kate to arbitrate on an individual basis. Under what circumstances should a court deny the employer's motion to compel arbitration?

The issue in Kate's case hinges on the fraught relationship between the Federal Arbitration Act (FAA) and other federal statutes. The FAA makes arbitration clauses "valid, irrevocable, and enforceable," subject only to traditional contract principles.[1] Yet the U.S. Supreme Court has never rigidly applied this mandate to federal statutory claims. For decades, the Court exempted congressionally created rights from the FAA.[2] Under what was known as the non-arbitrability doctrine, the Court held that Congress did not intend parties to assert public law claims in arbitration: an informal means of dispute resolution that "cannot provide an adequate substitute for a judicial proceeding."[3]

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1. 9 U.S.C. § 2 (2006).

2. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 435–38 (1953) ("[W]e decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid . . . an agreement for arbitration of issues arising under the [Securities] Act."), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

3. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 223 (1985).

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Nevertheless, as arbitration matured, the Court reconsidered this position.[4] Declaring that arbitration did not necessarily affect substantive rights, the Court replaced the bright-line non-arbitrability rule with a fact-specific test that allows plaintiffs to go to court if they prove that they cannot vindicate their federal statutory rights in arbitration.[5]

This "vindication of rights" rule—the ghost of the non-arbitrability doctrine—has recently become more important. For one, the Court has nearly concluded its slow march toward universal arbitrability.[6] Even decades after the Court switched to the vindication of rights approach, pockets of the non-arbitrability doctrine remained.[7] For instance, judges refused to grant preclusive effect to an arbitrator's resolution of civil rights claims if an arbitration clause appeared in a collective bargaining agreement (as opposed to an individualized employment contract).[8] But in its 2009 decision *14 Penn Plaza LLC v. Pyett*, the Court abolished that exception.[9] As a result, the vindication of rights defense—and not the non-arbitrability doctrine—will be the sole limit on the arbitrability of statutory claims in most contexts.[10]

At the same time, the unconscionability doctrine, a related check on drafter overreaching, has come under fire.[11] For years, courts could

4. *See, e.g.*, Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 89 (2000) ("[W]e have recognized that federal statutory claims can be appropriately resolved through arbitration . . . .").

5. *See id.* at 90.

6. *See* discussion *infra* Part II.

7. *See* discussion *infra* Part II.B.

8. *See* Rogers v. N.Y. Univ., 220 F.3d 73, 75 (2d Cir. 2000).

9. 556 U.S. 247, 274 (2009).

10. There are other exceptions to the principle of universal arbitrability. For example, Congress can expressly immunize certain claims from the FAA. *See, e.g.*, 15 U.S.C. § 1226(a)(2) (2006) (banning pre-dispute arbitration clauses in contracts between car manufacturers and dealers); *cf.* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669–70 (2012) (holding that Congress did not exempt claims under the Credit Repair Organization Act (CROA) from the FAA even though the CROA requires credit repair companies to inform consumers that they have a "right to sue"). Likewise, courts should decline to compel arbitration if there is an "inherent conflict" between the FAA and another federal statute. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226–27 (1987). For example, some courts have determined that "core proceedings" under the Bankruptcy Code are non-arbitrable as inherently conflicting with Congress's intent to consolidate all matters related to a debtor's insolvency into a single case in bankruptcy court. *See, e.g.*, *In re* White Mountain Mining Co., 403 F.3d 164, 169–70 (4th Cir. 2005). Because these issues arise infrequently, however, the vindication of rights doctrine is far and away the most important vestige of the non-arbitrability rule.

11. *See* Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2067 (2011) ("[C]ourts applying the unconscionability doctrine to arbitration provisions are not acting in a manner consistent with the FAA."). For my response to Friedman's excellent article—and more examples of the assault on unconscionability—see David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. (forthcoming 2012), 106 NW. U. L. REV.

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invoke either the vindication of rights rule (a creature of federal common law) or the unconscionability defense (a principle of state contract law) to invalidate one-sided arbitration clauses.[12] This symmetry arose because one prong of the unconscionability inquiry—substantive unconscionability—centers on the fairness of a specific contractual term.[13] As a result, if a plaintiff proved that some aspect of an adhesive arbitration clause thwarted her federal statutory rights, then a judge could find that the clause was unconscionable, violated the vindication of rights doctrine, or both.[14] The Court's 2011 decision in *AT&T Mobility LLC v. Concepcion* has forced lower courts to untangle the two rules.[15] *Concepcion* held that the FAA preempted a California Supreme Court opinion that deemed most class arbitration waivers in consumer contracts to be unconscionable.[16] Yet because the vindication of rights doctrine is a matter of federal law, the FAA cannot preempt it. Thus, after *Concepcion*, the court in Kate's hypothetical case cannot annul the class arbitration waiver on unconscionability grounds,[17] but it may be able to do so under the vindication of rights rule. For example, Kate could try to persuade the judge that she cannot exercise her federal statutory rights without the class action mechanism, either because she seeks to aggregate many "negative value" claims (where the litigation costs

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COLLOQUY 13, 13–15 (2011), http://www.law.northwestern.edu/lawreview/colloquy/2011/17/LRColl2011n17Horton.pdf. For Friedman's rejoinder, which takes his initial claim to the next level and asserts that unconscionability is not a valid defense to an arbitration clause, see Stephen E. Friedman, *A Pro-Congress Approach to Arbitration and Unconscionability*, 106 NW. U. L. REV. COLLOQUY 53, 54 (2011), http://www.law.northwestern.edu/lawreview/colloquy/2011/19/LRColl2011n19Friedman.pdf.

12. *See* Kristian v. Comcast Corp., 446 F.3d 25, 63 (1st Cir. 2006) (describing how plaintiffs' claims can be analyzed using either approach). "As a practical matter, there are striking similarities between the vindication of statutory rights analysis and the unconscionability analysis." *Id.*

13. *See* A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 122–23 (Ct. App. 1982) (discussing, in part, California's substantive unconscionability jurisprudence).

14. *See Kristian*, 446 F.3d at 29, 63 (finding several arbitration provisions prevented the vindication of plaintiffs' federal statutory rights and discussing the two methods of analysis).

15. 131 S. Ct. 1740 (2011).

16. *Id.* at 1750–51.

17. *See, e.g.*, Robinson v. Title Lenders, Inc., No. SC 91728, 2012 WL 724669, at *7 (Mo. Mar. 6, 2012) (en banc) ("*Concepcion* instructs clearly that a court cannot invalidate an arbitration agreement on the sole basis that it contains a class waiver."). *But cf.* Brewer v. Mo. Title Loans, No. SC 90647, 2012 WL 716878, at *7 (Mo. Mar. 6, 2012) (en banc) (invalidating *entire* arbitration clause that contained class arbitration waiver on unconscionability grounds).

outweigh any individual's potential damages)[18] or because "pattern and practice" claims under Title VII require class-wide proof.[19]

Despite its budding prominence, the vindication of rights doctrine has received little scholarly attention.[20] At the highest level of generality, the rule is an attempt to facilitate Congress's intent: lawmakers do not want parties to be able to relinquish their federal statutory rights at the pre-dispute stage.[21] I will call this idea—that parties cannot prospectively waive public law claims—the "statutory waiver rule." The non-arbitrability doctrine once implemented the statutory waiver rule by nullifying all pre-dispute contracts to arbitrate statutory claims.[22] Today, the vindication of rights doctrine inverts that approach by requiring forceful proof that a plaintiff cannot effectively prosecute her statutory cause of action in arbitration.[23] But like the non-arbitrability doctrine, the vindication of rights rule is simply the tool that courts use to enforce the statutory waiver rule: it invalidates arbitration provisions that are the functional equivalent of express waivers of federal statutory rights.[24]

But what explains the statutory waiver rule? The answer to that question has never been clear. For instance, some federal statutes contain express anti-waiver provisions.[25] The statutory waiver rule, however, applies not just to these laws—which Congress has shielded

18. *See In re* Am. Express Merchs.' Litig. (*Amex III*), 667 F.3d 204, 216 (2d Cir. 2012); *In re* Am. Express Merchs.' Litig. (*Amex II*), 634 F.3d 187, 197–98 (2d Cir. 2011), *rev'd*, 667 F.3d 204, 216 (2d Cir. 2012); Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 553 (S.D.N.Y. 2011). *See generally In re* Am. Express Merchs. Litig. (*Amex I*), 554 F.3d 300 (2d Cir. 2009), *vacated*, Am. Express. Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010).

19. *See* Chen-Oster v. Goldman, Sachs & Co. (*Chen-Oster I*), 785 F. Supp. 2d 394, 410 n.7 (S.D.N.Y. 2011).

20. For an early attempt to make sense of the Court's non-arbitrability jurisprudence, see Edward M. Morgan, *Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question*, 60 S. CAL. L. REV. 1059, 1077 (1987) (arguing that statutory claims should not be arbitrable if they seek to vindicate "social end[s] extrinsic to the parties' direct relationship," such as policies in favor of competitive markets and, presumably, anti-discrimination principles). As noted above, however, the Court has obliterated this distinction and has compelled arbitration of claims under statutes that "further important social policies." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27 (1991).

21. *See supra* notes 2–5 and accompanying text.

22. *See infra* text accompanying notes 42–60.

23. *See infra* Part II.B.

24. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985) (noting that when "choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, [the Court] would have little hesitation in condemning the agreement as against public policy").

25. *See* 15 U.S.C. § 77n (2006) (Securities Act anti-waiver provision); *id.* § 77cc(a) (Securities Exchange Act anti-waiver provision).

from market forces—but to *all* federal legislation.[26] Similarly, it is not immediately apparent why lawmakers would wish to forbid parties with equal bargaining power from contracting around intrusive, cumbersome regulation. Finally, there is a plausible argument that one-sided arbitration clauses are efficient. In a competitive market, drafters must pass their litigation and liability savings back to adherents. In turn, consumers and employees might prefer to have extra money in their pockets rather than retain their ability to sue for violation of the public laws.[27] Thus, the statutory waiver rule's normative foundation remains poorly understood.

This uncertainty has radiated out into the case law. Even putting aside the nascent class action issue, circuits disagree over how to implement the vindication of rights doctrine. For example, some jurisdictions annul cost-splitting clauses if they make arbitration prohibitively expensive for a specific plaintiff,[28] while others step back and consider the effect on other, similarly situated litigants.[29] Courts are also divided about the validity of pay-your-own-way and loser-pays provisions, as well as how to treat after-the-fact efforts by defendants to cure prohibitive arbitral costs by offering to reimburse the plaintiff.[30] More generally, the Seventh Circuit has hinted that it does not recognize the statutory waiver rule, opining that "the Supreme Court has never held that *any* entitlement is outside the domain of contract."[31]

In this invited contribution to the *University of Kansas Law Review*'s Symposium, *Perspectives on the Current State of Arbitration Law*, I seek to understand this aspect of the federal law of arbitrability by situating it within a larger context: the debate over inalienability. Certain things cannot be exchanged for consideration, even if both parties are informed, competent, and acting voluntarily.[32] For instance, the state will not honor attempts to sell infants, body parts,[33] the power to vote in general

26. *See* discussion *infra* Part II.A.

27. *See infra* text accompanying notes 151–57.

28. *See, e.g.*, Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 555, 557 (4th Cir. 2001).

29. *See, e.g.*, Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 663 (6th Cir. 2003).

30. *See infra* text accompanying notes 100–14.

31. Metro E. Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l, Inc., 294 F.3d 924, 928 (7th Cir. 2002).

32. Arbitration has long been entangled with various forms of inalienability. For instance, in the eighteenth and nineteenth centuries, the ouster doctrine forbade parties from contracting around the jurisdiction of the courts. *See, e.g.*, Kill v. Hollister, (1746) 95 Eng. Rep. 532 (K.B.) 532; 1 Wils. 129 (holding that "the agreement of the parties cannot oust this Court").

33. *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1856 (1987); *see*

elections,[34] or the need to comply with civic duties such as jury service or the military draft.[35] These limits on freedom of contract are controversial.[36] Yet courts and scholars have defended them on several grounds. For instance, inalienability can prevent market failures that would result from poor information or negative externalities.[37] In addition, it can serve as a bulwark against the commodification of cherished objects or entitlements.

I draw on these rationales to bolster the statutory waiver rule and to propose several changes to the vindication of rights doctrine. First, I argue that even if one-sided arbitration clauses lower prices and raise wages, they are not necessarily socially beneficial. Not all rights are commensurate with money: we value certain entitlements, such as freedom from discrimination, differently than we value cash. Because these two things cannot be compared along a common metric, an adherent who surrenders her anti-discrimination rights for an increased salary is not truly "better off."[38] As a result, I propose that courts relax the vindication of rights burden for anti-discrimination claimants.

Second, I contend that, in some contexts, the statutory waiver rule and the vindication of rights doctrine prevent negative externalities.[39] For example, prospective waivers of antitrust and securities claims harm the public by undermining markets and causing the misallocation of capital. In addition, allowing defendants to salvage an otherwise invalid arbitration clause by paying a specific plaintiff's arbitral costs affects third parties: it deters future litigants who will be subject to the same harsh terms. At the same time, though, I show how mass contracting creates unique problems about what counts as an "externality."

Finally, I evaluate the federal law of arbitrability through the lens of non-commodification theory: the idea that permitting the sale of a thing

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also Coyote Pub., Inc. v. Miller, 598 F.3d 592, 603 (9th Cir. 2010) (acknowledging "the bedrock idea that '[t]here are, in a civilized society, some things that money cannot buy' is deeply rooted in our nation's law and public policy" (quoting *In re* Baby M, 537 A.2d 1227, 1249 (N.J. 1988))), *cert. denied*, 131 S. Ct. 1556 (2011).

34. *See* Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 987–88 (1985); Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1324 (2000).

35. *See* Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 967 (1985).

36. *See* Radin, *supra* note 33, at 1851, 1859–63 (discussing debates regarding the bounds of inalienability).

37. *See id.* at 1863–70.

38. *See* discussion *infra* Part III.A.

39. *See* discussion *infra* Part III.B.

can change the thing itself.[40] At first blush, non-commodification analysis, which we normally associate with intensely personal objects or entitlements, seems to have little bearing on the pre-dispute inalienability of federal statutory rights. Upon closer inspection, however, the statutory waiver rule and the vindication of rights doctrine can be seen as preserving the distinctive qualities of congressional lawmaking—its pedigree and expressive function—in an era where private parties exercise legislative-like power. By creating a safe harbor for Congress's handiwork, these principles maintain a necessary division between private and public law. I argue that courts can further this goal by being skeptical of pay-your-own-way and loser-pays provisions: one-sided clauses that serve no arbitration-related purpose and thus are bald attempts to rewrite the underlying statutory scheme.[41]

This Article proceeds as follows. Part II traces the development of the non-arbitrability doctrine and the vindication of rights rule. It reveals that confusion about the statutory waiver rule—the premise that animates both approaches—has made it difficult for judges to apply these principles. Part III uses justifications for inalienability in other contexts to illuminate the statutory waiver rule and propose several changes to the vindication of rights doctrine.

II. FROM NON-ARBITRABILITY TO VINDICATION OF RIGHTS

In this Part, I describe the intersection of the FAA and other federal statutes. I begin with the non-arbitrability doctrine: courts' initial knee-jerk assumption that arbitration was incompatible with federal statutory rights. I trace how this jaundiced view evolved into the vindication of rights doctrine, which requires plaintiffs to marshal concrete proof that

40. *See* discussion *infra* Part III.C.

41. A perceptive reader will notice that most of the justifications I offer for the rules that safeguard against prospective waiver of federal statutory rights apply with equal force to state legislation. Yet it seems unlikely that courts will nullify arbitration clauses on the grounds that they prevent a plaintiff from effectively pursuing state statutory claims. After all, under the Supremacy Clause, the FAA—federal substantive law—overrides any conflicting state policy. *See* Kilgore v. KeyBank, Nat'l Ass'n, 2012 WL 718344, at *13 (9th Cir. Mar. 7, 2012) (finding that the FAA preempted a California common law rule that excluded public injunction claims from arbitration because "[t]he FAA is 'the supreme law of the land'" (quoting U.S. CONST. art. VI)); *see also* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."). *But cf.* Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 81 (D.C. Cir. 2005) (suggesting that a party may "resist[] arbitration on the ground that the terms of an arbitration agreement interfere with the effective vindication of [state] statutory rights").

they cannot effectively prosecute congressionally created rights in arbitration. I reveal that these two principles are actually drastically different ways of trying to achieve the same objective: barring parties from contracting away their ability to sue for future statutory violations. I then show how uncertainty about the policy basis of this premise has led to disagreement over the contours of the vindication of rights doctrine.

A. Non-Arbitrability

The non-arbitrability doctrine first appeared in the Court's 1953 decision *Wilko v. Swan*.[42] In that case, the Court refused to compel arbitration of an alleged violation of the Securities Act of 1933.[43] The Securities Act contains two unique components: section 22 gives plaintiffs broad discretion to choose a venue and forum,[44] and section 14 invalidates "[a]ny condition, stipulation, or provision . . . waiv[ing] compliance with any provision of this subchapter."[45] The Court determined that because the arbitration clause at issue overrode the court-selection rights bestowed by section 22, it was an impermissible waiver under section 14.[46] Nevertheless, on the general issue of the permissibility of arbitrating statutory claims, *Wilko* appeared to be at war with itself. At one point, the opinion acknowledged that the FAA serves the salutary purpose of "avoiding the delay and expense of litigation," and may be "useful[] . . . in controversies based on statutes."[47] But later, the Court implied that the informality of arbitration dilutes the potency of the statutory scheme.[48] According to the Court, because arbitrators lack legal training and need not memorialize their decisions in writing, the "effectiveness" of the Securities Act "is lessened in arbitration as compared to judicial proceedings."[49]

Lower courts read *Wilko* broadly. They saw it as a mandate to strike down any pre-dispute contract to arbitrate a claim that was "of a

42. 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

43. *Id.* at 438.

44. 15 U.S.C. § 77v(a) (2006).

45. *Id.* § 77n.

46. *Wilko*, 346 U.S. at 434–35.

47. *Id.* at 431–32.

48. *See id.* at 435.

49. *Id.* at 435–36.

character inappropriate for enforcement by arbitration."[50] For example, several circuits refused to compel arbitration of purported violations of the Sherman Act.[51] Unlike the Securities Act,[52] the Sherman Act does not feature an anti-waiver provision. Nevertheless, courts explained that the statute serves a societal interest that transcends the parties to any deal:

> A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest. Antitrust violations can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage.[53]

In addition, these judges reasoned that Congress could not have meant to entrust antitrust issues to arbitrators, who often worked in the business world—the very community the Sherman Act regulates.[54]

Yet these concerns—the public interest in the enforcement of statutes and the specter of arbitral bias or incompetence—have no limiting principle. Indeed, all federal regulation can be seen as serving vital societal functions, and the risk that it might be interpreted by an unworthy arbitrator is a hypothesis that cannot be falsified. Courts thus applied the non-arbitrability doctrine to a wide range of other laws. They invalidated pre-dispute contracts to arbitrate claims under the Patent Act,[55] the Commodity Exchange Act,[56] the Railway Labor Act (RLA),[57]

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50. Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 825 (2d Cir. 1968) (internal quotation marks omitted) (quoting Wilko v. Swan, 201 F.2d 439, 444 (2d Cir. 1953), *rev'd*, 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989)) ("[W]e conclude that the antitrust claims raised here are inappropriate for arbitration.").

51. *Id.* at 825–27; *see also* Lake Commc'ns., Inc. v. ICC Corp., 738 F.2d 1473, 1477–80 (9th Cir. 1984); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155, 162–63 (1st Cir. 1983), *aff'd in part, rev'd in part,* 473 U.S. 614 (1985); Univ. Life Ins. Co. v. Unimarc Ltd., 699 F.2d 846, 850–51 (7th Cir. 1983); Lee v. Ply*Gem Indus., Inc., 593 F.2d 1266, 1274–75 (D.C. Cir. 1979); Cobb v. Lewis, 488 F.2d 41, 48 (5th Cir. 1974); Helfenbein v. Int'l Indus., 438 F.2d 1068, 1070 (8th Cir. 1971).

52. *See supra* notes 43–45 and accompanying text.

53. *Am. Safety*, 391 F.2d at 826 (citations omitted).

54. *Id.* at 827.

55. *See* Hanes Corp. v. Millard, 531 F.2d 585, 593 (D.C. Cir. 1976), *superseded in part by statute*, Act of August 27, 1982, ch. 29, § 294, 96 Stat. 317 (codified as amended at 35 U.S.C. § 294 (2006), *and overruled in part by* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); Beckman Instruments, Inc. v. Technical Dev. Corp., 433 F.2d 55, 63 (7th Cir. 1970).

56. *See* Breyer v. First Nat'l Monetary Corp., 548 F. Supp. 955, 961 (D.N.J. 1982); Bache Halsey Stuart, Inc. v. French, 425 F. Supp. 1231, 1232–34 (D.D.C. 1977). *But see* Smoky Greenhaw

the Securities Exchange Act of 1934,[58] the Racketeer Influenced and Corrupt Practices Act (RICO),[59] and the Employment Retirement Income Security Act.[60] Paradoxically, many of these same courts upheld contracts to arbitrate *existing* statutory claims, which they conceptualized as a species of settlement agreement.[61] They did not attempt to square this approach with the reasoning behind the blanket ban they had imposed on pre-dispute agreements to arbitrate federal statutory claims;[62] indeed, it seemed unlikely that the mere fact a dispute had arisen diminished the need for prosecution of the public laws or made arbitrators more capable.

These decisions also suffered from a second flaw: they created confusion about the relationship between the non-arbitrability doctrine and congressional intent. For one, it was hard to square the reflexive non-arbitrability rule that courts had created with the fact that the FAA's text does not categorically exempt federal statutory claims. Moreover, like the Securities Act at issue in *Wilko*, some federal laws contain express non-waiver provisions.[63] But widespread application of the non-arbitrability doctrine made these clauses superfluous; it applied with

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Cotton Co. v. Merrill Lynch Pierce Fenner & Smith, Inc., 720 F.2d 1446, 1449 (5th Cir. 1983).

57. *See* Air Line Pilots Ass'n, Int'l v. Nw. Airlines, Inc., 627 F.2d 272, 277 (D.C. Cir. 1980); Ruby v. TACA Int'l Airlines, S.A., 439 F.2d 1359, 1364–65 (5th Cir. 1971). Courts reached these results even though the RLA requires parties to submit "disputes over the application or interpretation of bargaining agreements . . . to arbitration." 627 F.2d at 275.

58. *See* DeLancie v. Birr, Wilson & Co., 648 F.2d 1255, 1258–59 (9th Cir. 1981); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore, 590 F.2d 823, 827–29 (10th Cir. 1978); Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith Inc., 558 F.2d 831, 834–35 (7th Cir. 1977).

59. *See* Universal Marine Ins. Co. v. Beacon Ins. Co., 588 F. Supp. 735, 738 (W.D.N.C. 1984); Wilcox v. Ho-Wing Sit, 586 F. Supp. 561, 567 (N.D. Cal. 1984).

60. *See* Barrowclough v. Kidder Peabody & Co., 752 F.2d 923, 939 (3d Cir. 1985), *overruled by* Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3d Cir. 1993); Amaro v. Cont'l Can Co., 724 F.2d 747, 752 (9th Cir. 1984); Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 431 F. Supp. 271, 277 (E.D. Pa. 1977).

61. *See* Coenen v. R.W. Pressprich & Co., 453 F.2d 1209, 1215 (2d Cir. 1972) (finding that "claimant is not required to sue" to enforce federal antitrust law and could agree to settle or arbitrate after the dispute arose); Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 980, 984 (9th Cir. 1970) (finding enforceable only agreements to arbitrate existing antitrust claims, as opposed to claims not yet arisen).

62. *See* Cobb v. Lewis, 488 F.2d 41, 48 (5th Cir. 1974) ("[W]e agree and hold that there is an exception to the rule against arbitration of antitrust issues for cases where an agreement to arbitrate is made *after* a dispute arises . . . .").

63. *See supra* notes 43–45 and accompanying text. The Securities Exchange Act also contains such a provision. 15 U.S.C. § 78cc(a) (2006) ("Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder . . . shall be void.").

equal force to statutes that Congress had shielded from private agreement and to those that Congress had not.

Despite this analytical imprecision, the Court continued to invoke the non-arbitrability rule. In *Alexander v. Gardner-Denver Co.*, decided in 1974, the Court allowed the plaintiff to pursue a Title VII claim against his former employer in court, even though his collective bargaining agreement contained a broad arbitration provision and an arbitrator had ruled that he had been "discharged for just cause."[64] Citing only *Wilko*, the Court announced that "it [is] clear that there can be no prospective waiver of an employee's rights under Title VII."[65] As a result, the Court determined that Congress could not have intended alleged violations of the civil rights laws to be resolved in a forum where "discovery, compulsory process, cross-examination, and testimony under oath[] are often severely limited or unavailable."[66] In 1981, the Court noted similar concerns in *Barrentine v. Arkansas-Best Freight System, Inc.*, denying preclusive effect to an arbitrator's resolution of an employee's Fair Labor Standards Act claim.[67] Three years later, in *McDonald v. City of West Branch*, the Court refused to enforce an arbitrator's ruling in a § 1983 case, flatly declaring that arbitration "cannot provide an adequate substitute for a judicial trial."[68]

B. Vindication of Rights

Just one year after *McDonald*, the Court offered a fundamentally different vision of the relationship between the FAA and other federal rights. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court compelled arbitration of a complex antitrust dispute between a Japanese car manufacturer and a Puerto Rican car dealer.[69] Although the Court noted that arbitration plays a vital role in international transactions,[70] its reasoning swept far more broadly. In sharp contrast to

64. 415 U.S. 36, 42, 59–60 (1974).

65. *Id.* at 51.

66. *Id.* at 57–58.

67. 450 U.S. 728, 734 (1981).

68. 466 U.S. 284, 292 (1984).

69. 473 U.S. 614, 616–17, 640 (1985).

70. *Id.* at 629 ("[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement . . . ." (citing Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974))).

its previous holdings, the Court implied that arbitration was, in fact, outcome-neutral:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.[71]

At the same time, the Court clarified that it was not abolishing the statutory waiver rule, reasoning that if the arbitration clause acted "as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy."[72] Thus, although the Court paved the way for the arbitration of federal statutory claims, it declined to give companies carte blanche to rewrite the public laws through one-sided arbitration clauses.

In 1991, the Court continued to retreat from the non-arbitrability doctrine in *Gilmer v. Interstate/Johnson Lane Corp.* by compelling arbitration of a claim for wrongful firing under the Age Discrimination in Employment Act (ADEA).[73] Although the Court acknowledged that the ADEA furthered important policies, it opined that the statute would "'continue to serve both its remedial and deterrent function'" as long as litigants could "'vindicate [their] statutory cause of action in the arbitral forum.'"[74] In a preview of the issues that would later arise under the vindication of rights doctrine, the Court then explained why the plaintiff would be able to pursue his claim adequately. The Court noted that the New York Stock Exchange arbitral rules, which would govern the dispute, "provide[d] protections against biased [arbitral] panels," "allow[ed] for document production, information requests, depositions, and subpoenas," and "require[d] that all arbitration awards be in writing."[75] Thus, the Court compelled arbitration only after determining

71. *Id.* at 628.

72. *Id.* at 637 n.19. Shortly afterward, the Court underscored its new framework for gauging the arbitrability of public law claims by overruling *Wilko* and compelling arbitration of asserted violations of the Securities Act, Securities Exchange Act, and RICO. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484–85 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227–31 (1987).

73. 500 U.S. 20, 28 (1991).

74. *Id.* (alteration in original) (quoting *Mitsubishi Motors*, 473 U.S. at 637).

75. *Id.* at 30–32.

that the plaintiff's rights would survive the transplant to the extrajudicial forum.[76]

In 2000, the Court squarely considered the vindication of rights doctrine for the first time in *Green Tree Financial Corp.-Alabama v. Randolph*.[77] Larketta Randolph financed the purchase of a mobile home through Green Tree.[78] Her loan contained a clause that mandated arbitration but said nothing about how the proceeding was to be conducted.[79] She then filed a class action against Green Tree under the Truth in Lending Act (TILA) and Equal Credit Opportunity Act (ECOA).[80] When Green Tree moved to compel arbitration, Randolph argued that she lacked the resources to arbitrate her claims, citing evidence that "arbitration filing fees for claims below $10,000 were generally $500 and that the average arbitrator's fee per day is $700."[81] The district court ordered the matter to arbitration,[82] but the Eleventh Circuit reversed.[83] The appellate court was troubled by the arbitration clause's silence:

> The arbitration clause in this case raises serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses that may curtail or bar a plaintiff's access to the arbitral forum . . . . This clause says nothing about the payment of filing fees or the apportionment of the costs of arbitration. It neither assigns an initial responsibility for filing fees or arbitrators' costs, nor provides for a waiver in cases of financial hardship. It does not say whether consumers, if they prevail, will nonetheless be saddled with fees and costs in excess of any award.[84]

The Supreme Court reversed.[85] It had no quarrel with the general proposition that heavy arbitral costs could serve as the basis for annulling an arbitration clause.[86] The Court, however, determined that Randolph's

76. *Id.* at 26–32.

77. 531 U.S. 79 (2000).

78. *Id.* at 82.

79. *Id.* at 82–83 & n.1.

80. *Id.* at 83.

81. Brief of Respondent, *Green Tree*, 531 U.S. 79 (No. 99-1235), 2000 WL 1086800 at *3.

82. Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410, 1425–26 (M.D. Ala. 1997), *rev'd sub nom.* Randolph v. Green Tree Fin. Corp.-Ala., 178 F.3d 1149 (11th Cir. 1999), *rev'd*, 531 U.S. 79 (2000).

83. *Green Tree*, 178 F.3d at 1159.

84. *Id.*

85. *See Green Tree*, 531 U.S. at 91–92.

86. *Id.* at 90.

argument that she would incur such costs relied on "unfounded assumptions."[87] In a critical passage, the Court demanded more of plaintiffs with vindication of rights allegations, declaring that "[t]he 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement."[88]

After *Green Tree*, jurisdictions have disagreed about how to assess vindication of rights challenges. One common problem is cost-splitting provisions, which usually require plaintiffs to pay half of the arbitral expenses. In *Bradford v. Rockwell Semiconductor Systems, Inc.*, the Fourth Circuit considered the propriety of such a clause.[89] The court read *Green Tree* to "suggest[] that some showing of individualized prohibitive expense . . . [is] necessary to invalidate an arbitration agreement."[90] As a result, the court adopted a test that probes the plaintiff's financial resources—her income, net worth, checking account balance, investments, debts, and other obligations—and then considers whether the added cost of arbitration (as compared to litigation) will deter her.[91]

Bradford's plaintiff-specific approach has been influential in other circuits.[92] Yet some courts interpret *Bradford* as erecting a virtually insurmountable bar to vindication of rights claims. For instance, in *Koridze v. Fannie Mae Corp.*, a Title VII plaintiff introduced compelling evidence of financial hardship.[93] In the district court's own words, she proved that

87. *Id*. at 90 n.6.

88. *Id.* at 91–92 (citations omitted). This theme of judicial non-interference with arbitration loomed large over the next few Terms. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84–85 (2002), the Court held that an arbitrator (not a court) should decide whether an arbitral statute of limitations barred a claim. A year later, in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 453–54 (2003), the Court also permitted arbitrators to resolve whether an arbitration clause prohibited class arbitration when it was "silent" on the issue. Finally, in *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 407 (2003), the Court ordered arbitration of RICO claims even though the arbitration clause arguably prohibited treble damages that are recoverable under the statute. Justice Scalia echoed the *Green Tree* Court's rhetoric about not making assumptions as to what would occur in arbitration, reasoning that "'mere speculation' that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt" was insufficient to entitle the plaintiff to a judicial forum. *Id.* at 406–07.

89. 238 F.3d 549, 551 (4th Cir. 2001).

90. *Id.* at 557.

91. *Id.* at 556.

92. *See* James v. McDonald's Corp., 417 F.3d 672, 678–80 (7th Cir. 2005); Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1259–60 (11th Cir. 2003); LaPrade v. Kidder, Peabody & Co., Inc., 246 F.3d 702, 708 (D.C. Cir. 2001).

93. 593 F. Supp. 2d 863, 864, 869–70 (E.D. Va. 2009).

> (i) she is currently unemployed and does not receive income; (ii) her husband's income is roughly $l,500-$2,000 per month after taxes; (iii) her monthly expenses—which include a $1,807.32 monthly mortgage payment and a $498.75 monthly condominium fee—total approximately $3325; (iv) she and her husband have minimal funds in their bank accounts and 401(k) plans, and they currently possess negligible, if any, equity in their condominium; (v) she and her husband are without medical insurance; (vi) she and her husband have one minor child, currently are expecting another, and provide economic support to her husband's family in the Republic of Georgia; and (vii) neither plaintiff, nor her husband, have sufficient property to serve as collateral to obtain a loan to advance arbitration costs.[94]

Nevertheless, citing the plaintiff's educational background and employment history, the court held that she had not proven that "she is *unable* to earn sufficient income to advance arbitration costs; rather, she has merely established that she currently *does not* earn such income."[95]

Other courts view the vindication of rights inquiry more broadly. In *Morrison v. Circuit City Stores, Inc.*, the Sixth Circuit criticized *Bradford*'s laser-like focus on individual plaintiffs.[96] *Morrison* noted that although *Bradford*'s approach might provide remedies for aggrieved parties in particular cases, it did not do enough to discourage statutory violations in the first instance.[97] To ensure that public laws continue to prevent wrongdoing, *Morrison* held that judges must evaluate not only whether arbitral costs would thwart this particular plaintiff's claims, "but also whether other similarly situated individuals would be deterred . . . as well."[98] For instance, in stark contrast to the searching *Bradford* test, *Morrison* invalidated a cost-splitting provision based on nothing more

94. *Id.* at 869–70. The court also noted that the plaintiff had not shown the amount of costs she would incur in litigation. *Id.* at 870–71.

95. *Id.* at 870.

96. 317 F.3d 646, 660 (6th Cir. 2003).

97. *Id.* at 661.

98. *Id*. Similarly, some district courts in the Second Circuit also ask whether "the cost of arbitration may have a 'chilling effect' on similarly situated litigants, as opposed to the particular effect on the plaintiff in the case." EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C., 448 F. Supp. 2d 458, 463 (E.D.N.Y. 2006); *see also* Ball v. SFX Broad., Inc., 165 F. Supp. 2d 230, 239–40 (N.D.N.Y. 2001) (examining only whether a plaintiff will likely incur substantial arbitral costs, not whether the plaintiff can afford to pay those costs). *But see In re* Currency Conversion Fee Antitrust Litig., 265 F. Supp. 2d 385, 411 (S.D.N.Y. 2003) (adopting *Bradford*'s approach); Stewart v. Paul, Hastings, Janofsky & Walker, LLP, 201 F. Supp. 2d 291, 293–94 (S.D.N.Y. 2002) (same); Mildworm v. Ashcroft, 200 F. Supp. 2d 171, 179–80 (E.D.N.Y. 2002) (same). In addition, the Ninth Circuit has invalidated cost-splitting provisions under the unconscionability doctrine. *See* Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 785 (9th Cir. 2002); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893–94 (9th Cir. 2002).

than the fact a plaintiff "was employed . . . as a mechanic and as a salesperson" and would need to deposit over $1000 with the arbitrator before the hearing.[99]

Another contentious vindication of rights issue revolves around attorneys' fees. Arbitration clauses sometimes require each party to pay their own legal bills.[100] Courts have reached radically different conclusions about whether these terms can override federal statutes that reward successful plaintiffs by allowing them to recover litigation expenses.[101] For instance, in *Spinetti v. Service Corp. International*, the Third Circuit struck down a pay-your-own-way provision as an improper attempt to alter the fee-shifting regimes of Title VII and the ADEA.[102] Likewise, in the Seventh Circuit case of *McCaskill v. SCI Management Corp.*, the fact that an arbitration clause could not preclude an award of attorneys' fees under federal anti-discrimination statutes seemed so obvious that the defendant conceded the point at oral argument.[103] Yet later that same year, the Seventh Circuit opined in *Metro East Center for Conditioning & Health v. Qwest Communications International, Inc.* that there was nothing troubling about an arbitration clause displacing the fee-shifting mechanism of a federal telecommunications statute.[104] The court questioned the soundness of the statutory waiver rule:

> As far as we know, the Supreme Court has never held that any entitlement is outside the domain of contract, unless the statute forbids waiver . . . . One aspect of personal liberty is the entitlement to exchange statutory rights for something valued more highly. Instead of offering a benefit only to a person who is required to arbitrate or litigate, a fee-shifting statute may provide a benefit more widely to the extent that it changes the terms of trade; the customer sells the entitlement back to the phone company for cash (in the form of lower rates).[105]

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99. *See Morrison*, 317 F.3d at 676–78.

100. *See* Faber v. Menard, Inc., 367 F.3d 1048, 1055 (8th Cir. 2004).

101. *See* Spinetti v. Serv. Corp. Int'l, 324 F.3d 212, 216 (3d Cir. 2003).

102. *Id.*; *cf.* Parilla v. IAP Worldwide Servs., VI, Inc., 368 F.3d 269, 288 (3d Cir. 2004) (holding that such a provision was unconscionable when applied to Title VII and state law claims); Herrera v. Katz Commc'ns, Inc., 532 F. Supp. 2d 644, 647 (S.D.N.Y. 2008) (assuming, but not deciding, that such a clause would be invalid).

103. 298 F.3d 677, 680 (7th Cir. 2002) (en banc).

104. 294 F.3d 924, 928–29 (7th Cir. 2002).

105. *Id.* The arbitration clause in *Metro East* appeared in a tariff filed with the Federal Communications Commission (FCC); thus, the court ultimately concluded that "only the FCC may consider an objection to the tariff's [arbitration clause]." *Id.* at 930. Similarly, in *Faber*, the Eighth Circuit enforced a provision that required each party to bear its own attorneys' fees against an

Likewise, jurisdictions have splintered over loser-pays clauses, which entitle the prevailing party to recover their attorneys' fees. Several courts have held that these provisions—which mean that plaintiffs may end up subsidizing the defense of their own lawsuit—are unconscionable.[106] Remarkably, however, vindication of rights challenges to these clauses generally fail.[107] For instance, in *Musnick v. King Motor Co. of Fort Lauderdale*, the Eleventh Circuit reasoned that because the plaintiff had not actually proven that *he would lose*, the risk that he would be saddled with the defendant's legal bills was "too 'speculative' to render [the] agreement to arbitrate unenforceable."[108]

> [A]t this point Plaintiff has not been assessed with any fees, nor is it certain that he ever will be. Given these facts, we cannot conclude that the arbitration agreement constitutes a barrier to vindication of Plaintiff's rights. Plaintiff's speculation about prohibitive costs is just that—speculation; this is not enough to invalidate an otherwise enforceable arbitration provision.[109]

Still another source of confusion is whether extra-contractual evidence can impact the vindication of rights analysis. Defendants

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ADEA claimant, tersely concluding that it was neither "substantively unfair" nor "inimical to the public good." 367 F.3d at 1055.

106. Most of these cases involve statutes that allow successful plaintiffs (but not defendants) to recover attorneys' fees. *See, e.g.*, Pokorny v. Quixtar, Inc., 601 F.3d 987, 1004 (9th Cir. 2010) (RICO); *Parilla*, 368 F.3d at 284 (Title VII); R&L Ltd. Invs., Inc. v. Cabot Inv. Props., LLC, 729 F. Supp. 2d 1110, 1117 (D. Ariz. 2010) (state securities claims); Walters v. A.A.A. Waterproofing, Inc., 211 P.3d 454, 458 (Wash. Ct. App. 2009) (state wage claims); *cf.* Fortune v. Castle Nursing Homes, Inc., 843 N.E.2d 1216, 1220 (Ohio Ct. App. 2005) (negligence claim against nursing home). *But see* Hopkins v. New Day Fin., 643 F. Supp. 2d 704, 720 (E.D. Pa. 2009) (rejecting unconscionability challenge to loser-pays provision when arbitration clause excused compliance with the provision if the plaintiffs lacked financial resources); Motsinger v. Lithia Rose-FT, Inc., 156 P.3d 156, 162 (Or. Ct. App. 2007) (rejecting unconscionability challenge to loser-pays clause when plaintiff offered no evidence about her financial status or the likely costs of arbitration).

107. *See* Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1260 (11th Cir. 2003).

108. *Id.*

109. *Id.* (quoting Goodman v. ESPE Am., Inc., 84 Fair Empl. Prac. Cas. (BNA) 1629 (E.D. Pa. 2001)) (internal quotations omitted). The court explained that the plaintiff could raise this argument after the arbitration had been conducted, noting that courts can vacate arbitral awards for "manifest disregard of the law." *Id.* at 1261. *But see* James v. McDonald's Corp., 417 F.3d 672, 680 n.4 (7th Cir. 2005) ("[Plaintiff] maintains that she cannot afford to pursue arbitration in the first instance. A review of the allocation of costs conducted after the arbitration would be of little help to her."). For other cases enforcing loser-pays clauses, see Summers v. Dillard's, Inc., 351 F.3d 1100, 1101 (11th Cir. 2003); Thompson v. Irwin Home Equity Corp., 300 F.3d 88, 91–92 (1st Cir. 2002); Am. Heritage Life Ins. Co. v. Orr, 294 F.3d 702, 712 (5th Cir. 2002); DeGroff v. MascoTech Forming Tech., 179 F. Supp. 2d 896, 910 (N.D. Ind. 2001). For a decision in which the court rejected an unconscionability challenge to a loser-pays clause in a case involving state consumer protection statute, see Branco v. Norwest Bank Minn., N.A., 381 F. Supp. 2d 1274, 1282 (D. Haw. 2005).

sometimes attempt to defuse cost-based challenges by promising to pay a greater share of the arbitral expenses or waiving problematic aspects of the arbitration clause.[110] Courts have reacted to this gambit in varying ways.[111] Again, even judges within the same circuit have voiced irreconcilable views. In its 2003 en banc decision in *Morrison v. Circuit City Stores, Inc.*, the Sixth Circuit reasoned that because the vindication of rights analysis focuses on whether *prospective* litigants would be deterred—not just the plaintiff in the case at bar—a defendant cannot cure a deficient arbitration clause by offering to pay the plaintiff's costs.[112] One year later, in *Cooper v. MRM Investment Co.*, another Sixth Circuit panel followed *Morrison* and even noted an additional concern: allowing a defendant to ignore the plain language of its own contract would give it the power to unilaterally amend the arbitration agreement.[113] Nevertheless, in 2009, in *Mazera v. Varsity Ford*

110. *See* cases cited *infra* note 111.

111. *Compare* Spinetti v. Serv. Corp. Int'l., 324 F.3d 212, 217 n.2 (3d Cir. 2003) ("SCI's offer to pay the costs of arbitration upon proof that compelling Spinetti to pay her costs would be prohibitively expensive is an after-the-fact offer and will be treated as such."), *and* Murray v. United Food & Commercial Workers Int'l Union, 289 F.3d 297, 304 (4th Cir. 2002) ("The arbitration agreement is unenforceable as written and Local 400 may not rewrite the arbitration clause and adhere to unwritten standards on a case-by-case basis in order to claim that it is an acceptable one."), *and* Gourley v. Yellow Transp., 178 F. Supp. 2d 1196, 1205 (D. Colo. 2001) (declining defendant's "invitation to enforce the Arbitration Agreement absent the offending provisions"), *and* Kinkel v. Cingular Wireless, LLC, 857 N.E.2d 250, 259 (Ill. 2006) ("[A] defendant's after-the-fact offer to pay the costs of arbitration should not be allowed to preclude consideration of whether the original arbitration clause is unconscionable."), *with* Ragone v. Atl. Video at Manhattan Ctr., 595 F.3d 115, 124 (2d Cir. 2010) ("We believe that New York law would allow for the enforcement of the arbitration agreement as modified by the defendants' waivers."), *and* Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 300 (5th Cir. 2004) (reasoning that plaintiffs' "prohibitive costs argument has been mooted by Countrywide's representation to the district court that it would pay all arbitration costs"), *and* Anders v. Hometown Mortg. Servs., Inc., 346 F.3d 1024, 1029 (11th Cir. 2003) ("At oral argument before us, Hometown Mortgage's counsel said the stipulation means her client will pay 'what we need to pay to make it fair for Mr. Anders,' and the arbitrator will decide how much Hometown Mortgage should pay of Anders' costs."), *and* Coup v. Scottsdale Plaza Resort, LLC, No. CV-11-931-PHX-LOA, 2011 WL 4625966, at *20 (D. Ariz. Oct. 5, 2011) ("[Plaintiffs] do not demonstrate that arbitration will put them in any worse position than litigation in allowing them to pursue their claims, especially now that Dawson has unequivocally agreed to pay for all arbitration costs and fees."), *and Branco*, 381 F. Supp. 2d at 1283 ("Plaintiffs argument is moot because Defendants have offered to pay whatever fees necessary to find the arbitration agreement enforceable."), *and In re* Currency Conversion Fee Antitrust Litig., 265 F. Supp. 2d 385, 411–12 (S.D.N.Y. 2003) ("[D]efendants have offered to pay all arbitration fees, hearing fees, and arbitrators' fees, and to forgo any right to seek prevailing party attorneys' fees in arbitration.").

112. 317 F.3d 646, 676 (6th Cir. 2003) (en banc) ("Because the employer drafted the arbitration agreement, the employer is saddled with the consequences of the provision *as drafted*.").

113. 367 F.3d 493, 512–13 (6th Cir. 2004) ("MRM's offer was an impermissible attempt to vary the terms of a contract. There was neither a meeting of the minds nor consideration to support such a post hoc unilateral amendment of the agreement.").

Management Services, different Sixth Circuit judges enforced an arbitration clause—despite finding it "prohibitively expensive"—simply because the defendant stated that it "might" waive the requirement that the plaintiff pay a $500 deposit.[114]

On the flipside of the same issue, it is unclear how other avenues of plaintiff funding affect the vindication of rights analysis. For instance, in an insightful article, Christopher Drahozal notes that federal statutory claimants are often represented by contingency fee lawyers.[115] Drahozal argues that because these attorneys usually advance litigation expenses, they might cover arbitration costs as well.[116] In turn, if many plaintiffs do not pay up-front arbitral fees, then their individual finances—currently the centerpiece of cost-based vindication of rights challenges—would be far less probative of whether arbitration deters claims.[117] In fact, as Drahozal notes, the vindication of rights doctrine creates perverse incentives for the arbitration-phobic plaintiffs' bar: "[s]o long as attorneys can use the upfront costs of arbitration as a ground for challenging an arbitration agreement (enabling their client to bring his or her claim in court instead of in arbitration), attorneys have an incentive not to finance arbitration costs."[118] Ironically, however, courts generally use contingent representation as a one-way ratchet in the opposite direction: they only mention a plaintiff's *inability* to obtain counsel as a reason to *invalidate* an arbitration clause.[119]

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114. *See* 565 F.3d 997, 1004–05 (6th Cir. 2009). This ruling was all the more striking because the court did not conclusively determine that the defendant would waive the fee; rather, it only "suspect[ed]" that the defendant would "seriously entertain [the plaintiff's] waiver request." *Id.* at 1005 (noting also that the defendant's "counsel stated at oral argument that, although he could not predict with certainty how his client would respond to a waiver request, he thought it likely that such a request would be granted").

115. Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 734–35 (2006).

116. *Id.* ("Arbitration costs are simply another form of expense—like discovery costs, investigation costs, expert witness fees, and so on. Given that lawyers are willing to finance and insure against these other sorts of expenses, one would expect the same to be true for arbitration costs.").

117. Arguably, however, a plaintiff's finances might still be relevant; contingency-fee lawyers may be less likely to advance arbitral costs if they suspect that unsuccessful plaintiffs will not be able to reimburse them.

118. Drahozal, *supra* note 115, at 735.

119. *Compare* Brady v. Williams Capital Grp., L.P., 64 A.D.3d 127, 136 (N.Y. Ct. App. 2009) (reasoning that "out-of-pocket expenses for an employee filing a legal suit are minimal," partially because "attorneys may be likely to take the case on a contingency fee basis"), *with id.* at 157 (McGuire, J., dissenting in part) ("Nothing but sheer speculation supports the implicit assumption that representation on a contingency fee basis is more likely in litigation than when attorneys represent claimants in arbitration."). Other courts have similarly cited contingent fees' purported

This link between arbitration and the market for legal representation looms especially large for the final (and arguably most important) vindication of rights issue—the class arbitration waiver. For roughly two decades, companies have tried to use arbitration as a shield for class action liability.[120] By placing a class action waiver in an arbitration clause, they sought to endow it with the vigorous policy in favor of arbitration.[121] But starting with the California Supreme Court's 2005 decision in *Discover Bank v. Superior Court*, thirteen other jurisdictions struck down class arbitration waivers as unconscionable when applied to numerous low-value causes of action.[122] These courts explained that because these claims will either be prosecuted on a class basis or not at all, class arbitration waivers permit drafters to avoid liability.[123] In two recent blockbuster decisions, however, the U.S. Supreme Court undercut

role in access to counsel. *See, e.g.*, *Varsity Ford Mgmt. Servs.*, 565 F.3d at 1004 (6th Cir. 2009) ("Many potential plaintiffs who would otherwise pursue their federal statutory rights in court via a contingency-fee arrangement . . . might decline to do so in light of Varsity Ford's requirement that they deposit $500 within 10 days of an unfavorable decision on their grievance by the dealership's president."); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 664–65 (6th Cir. 2003) (en banc) (noting that most plaintiffs in court "will be represented by attorneys on a contingency-fee basis" but ignoring the fact that the same may be true for plaintiffs in arbitration). For the rare contrary view, see *Coffey v. Kellogg Brown & Root*, No. 1:08-CV-2911-JOF, 2009 WL 2515649, at *10 (N.D. Ga. Aug. 1, 2009) ("[T]here is no shortage of attorneys willing to take personal injury claims on a contingency fee basis.").

120. *See* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005).

121. *See id.*; Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 8–11 (2000).

122. 113 P.3d 1100, 1107–08 (Cal. 2005), *abrogated by* AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740 (2011); Homa v. Am. Express Co., 558 F.3d 225, 231 n.2, 233 (3d Cir. 2009), *abrogation recognized by* Litman v. Cellco P'ship, 655 F.3d 225, 231 (3d Cir. 2011); Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1218–19 (9th Cir. 2008); Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007) (applying Georgia law); Cooper v. QC Fin. Servs., Inc., 503 F. Supp. 2d 1266, 1285–90 (D. Ariz. 2007); Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 274–75 (Ill. 2006); Brewer v. Mo. Title Loans, Inc., 323 S.W.3d 18, 22–23 (Mo. 2010) (en banc), *vacated and remanded*, 131 S. Ct. 2875 (2011), *aff'd in part*, *rev'd in part*; No. SC 90647, 2012 WL 716878, at *7 (Mo. Mar. 6, 2012) (en banc); Fiser v. Dell Computer Corp., 188 P.3d 1215, 1222 (N.M. 2008); Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362, 373 (N.C. 2008); Vasquez-Lopez v. Beneficial Or., Inc., 152 P.3d 940, 948–54 (Or. App. 2007); Thibodeau v. Comcast Corp., 912 A.2d 874, 885–86 (Pa. Super. Ct. 2006), *abrogation recognized by* Brown v. Trueblue, Inc., No. 1:10-CV-0514, 2011 WL 5869773, at *3 (M.D. Pa. Nov. 22, 2011); Herron v. Century BMW, 693 S.E.2d 394, 399–400 (S.C. 2010), *aff'd*, 693 S.E.2d 394, 398–400 (S.C. 2010), *vacated*, Sonic Auto., Inc. v. Watts, 131 S. Ct. 2872 (2011); Scott v. Cingular Wireless, 161 P.3d 1000, 1007–08 (Wash. 2007) (en banc); Coady v. Cross Country Bank, Inc., 729 N.W.2d 732, 746–48 (Wis. Ct. App. 2007). Several other courts had already reached similar decisions. *See, e.g.*, Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000); Leonard v. Terminix Int'l Co., 854 So. 2d 529, 538 (Ala. 2002); Powertel, Inc. v. Bexley, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999); State *ex rel.* Dunlap v. Berger, 567 S.E.2d 265, 278–80 (W. Va. 2002).

123. *See* cases cited *supra* note 122.

this logic. First, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Court held that class arbitration was improper when an arbitration clause was "silent" on the permissibility of such a procedure.[124] Second, in *AT&T Mobility LLC v. Concepcion*, the Court held that the FAA preempts *Discover Bank*.[125] The Court reasoned that the California Supreme Court had used the unconscionability doctrine to require drafters to engage in class arbitration, making "the process slower, more costly, and more likely to generate procedural morass than final judgment."[126] Accordingly, the Court concluded that *Discover Bank* and its progeny "interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA."[127]

Although *Stolt-Nielsen* and *Concepcion* were seen as "the death knell" for class actions,[128] they may not apply so broadly. *Discover Bank* and its allied cases invoked contract principles that, like all state law, must yield when in conflict with the FAA. But if a plaintiff asserts federal statutory claims, the core insight of these opinions—that class arbitration waivers make certain lawsuits unmarketable—can be recast as a vindication of rights challenge. Indeed, before *Stolt-Nielsen* and *Concepcion*, some courts nullified class arbitration waivers when applied to negative-value federal statutory claims on the grounds that "no attorney (regardless of competence) would ever take such a case on a contingent fee basis."[129] Because the vindication of rights doctrine arises from federal common law—and is thus immune from FAA preemption—*Stolt-Nielsen* and *Concepcion*'s impact on these cases

124. 130 S. Ct. 1758, 1775 (2010) ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.").

125. 131 S. Ct. at 1750–51 ("[C]lass arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.").

126. *Id.* at 1751.

127. *Id.* at 1748.

128. Ashby Jones, *After AT&T Ruling, Should We Say Goodbye to Consumer Class Actions?*, WALL ST. J.L. BLOG (Apr. 27, 2011, 12:36 PM), http://blogs.wsj.com/law/2011/04/27/after-att-ruling-should-we-say-goodbye-to-consumer-class-actions/.

129. Caban v. J.P. Morgan Chase & Co., 606 F. Supp. 2d 1361, 1371 (S.D. Fla. 2009); *see also* Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007) ("While the subscribers in the instant case do not argue the class action waiver prevents them from vindicating their statutory rights, we nonetheless find the First Circuit's analysis in *Kristian* instructive."); Kristian v. Comcast Corp., 446 F.3d 25, 58 (1st Cir. 2006) (finding that class arbitration waiver impaired plaintiffs' ability to bring antitrust claims where expert fees would costs hundreds of thousands of dollars, but each plaintiff's recovery "will range from a few hundred dollars to a few thousand dollars at most"); *cf. In re* Cotton Yarn Antitrust Litig., 505 F.3d 274, 285 (4th Cir. 2007) ("[W]e have acknowledged that if a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement.").

remains hazy. On the one hand, as noted above, the vindication of rights doctrine is, at bottom, an attempt to square the FAA with other federal laws.[130] As some defendants have argued, the Court sometimes favors a statute with a broad preemptive ambit over other, "lesser" statutes. [131] Thus, by expanding the domain of the FAA, *Stolt-Nielsen* and *Concepcion* may have implicitly undercut the vindication of rights doctrine.[132] Indeed, as one district court put it, thanks to *Stolt-Nielsen* and *Concepcion*, there is now "considerable uncertainty surrounding the precise metes and bounds of the federal common law of arbitrability."[133]

In the *Amex* litigation, however, the Second Circuit determined that judges may still invalidate class arbitration waivers under the vindication of rights doctrine.[134] In 2009, the appellate court invalidated a class arbitration waiver on the grounds that a class of medium-sized merchants would not be able to vindicate their complex and expensive antitrust claims against American Express on an individual basis.[135] In 2010, the Supreme Court decided *Stolt-Nielsen* and subsequently remanded the *Amex* litigation for further consideration. Undeterred, in 2011, the Second Circuit held that the vindication of rights doctrine had survived:

> *Stolt-Nielsen* states that parties cannot be forced to engage in a class arbitration absent a contractual agreement to do so. It does not follow, as Amex urges, that a contractual clause barring class arbitration is *per se* enforceable. Indeed, our prior holding focused not on whether the plaintiffs' contract provides for class arbitration, but on whether the class action waiver is enforceable when it would effectively strip plaintiffs of their ability to prosecute alleged antitrust violations.[136]

130. *See supra* text accompanying notes 21–24.

131. *See* Chen-Oster v. Goldman, Sachs & Co. (*Chen-Oster II*), No. 10 Civ. 6950(LBS)(JCF), 2011 WL 2671813, at *3 n.2 (S.D.N.Y. July 7, 2011) (discussing and rejecting defendants' argument that federal courts often look to preemption jurisprudence when harmonizing statutes).

132. *See* D'Antuono v. Serv. Road Corp., 789 F. Supp. 2d 308, 339 (D. Conn. 2011) ("[T]he United States Supreme Court's holding in [*Concepcion*] only implicated federal preemption of a particular state law rule. But [we] know[] of no principled reason why federal law rules that have essentially the same purpose and effect as the *Discover Bank* rule would continue to be permissible after [*Concepcion*].").

133. *Id.* at 331.

134. *In re* Am. Express Merchs. Litig. (*Amex I*), 554 F.3d 300 (2d Cir. 2009), *vacated*, Am. Express. Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010).

135. *Id.* at 304.

136. *In re* Am. Express Merchs. Litig. (*Amex II*), 634 F.3d 187, 193–94 (2d Cir. 2011), *rev'd*, 667 F.3d 204, 216 (2d Cir. 2012).

Then, later that year, the Supreme Court decided *Concepcion*, prompting the Second Circuit to revisit the matter yet again. And, once more, the appellate panel stuck to its guns. Affirming its previous holdings, it announced in 2012 that the Supreme Court's recent jurisprudence did not affect the vindication of rights inquiry, reasoning that "[n]either *Stolt-Nielsen* nor *Concepcion* overrules *Mitsubishi*, and neither makes mention of *Green Tree*."[137] Thus, it appears that the vindication of rights doctrine has supplanted unconscionability as the primary means for courts to strike down class arbitration waivers.[138]

In sum, courts once exempted all federal statutory claims from the FAA's ambit; now, they compel arbitration of those claims unless a plaintiff proves that doing so will thwart her rights. The now-obsolete non-arbitrability rule and its predecessor, the vindication of rights doctrine, serve a common goal: preventing parties from prospectively relinquishing congressionally given rights. In turn, the policy basis of this objective has always been elusive. As a result, courts have implemented the vindication of rights doctrine inconsistently. In the next Part, I draw on inalienability theory to flesh out the statutory waiver rule and recalibrate the vindication of rights doctrine.

III. THE VINDICATION OF RIGHTS DOCTRINE AND INALIENABILITY

The statutory waiver rule and the vindication of rights doctrine are anomalies. In a society committed to the notion that unfettered exchange will shepherd an asset to its best use, inalienability is an "analytic

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137. *In re* Am. Express Merchs. Litig. (*Amex III*), 667 F.3d 204, 216 (2d Cir. 2012). Similarly, in *Chen-Oster v. Goldman, Sachs & Co.* (*Chen-Oster II*), No. 10 Civ. 6950(LBS)(JCF), 2011 WL 2671813, at *4 (S.D.N.Y. July 7, 2011), the Southern District of New York declined to submit a pattern or practice employment discrimination claim under Title VII to arbitration. The court noted that these unique causes of action "may not be brought by a single individual, but rather must be pursued by a class." Chen-Oster v. Goldman, Sachs & Co. (*Chen-Oster I*), 785 F. Supp. 2d 394, 408 (S.D.N.Y. 2011). Thus, the court read *Concepcion* not to foreclose it from allowing a class action to proceed when necessary to permit plaintiffs to "enforc[e] their statutory rights." *Chen-Oster II*, 2011 WL 2671813, at *4 (internal quotation marks omitted) (quoting *Amex II*, 634 F.3d 187, 199 (2d Cir. 2011)) (refusing to grant motion for reconsideration of court's original holding in light of *Concepcion*); *see also* Raniere v. Citigroup, Inc., No. 11 Civ. 2248, 2011 WL 5881926, at *13 (S.D.N.Y. Nov. 22, 2011) (noting that *Concepcion* does "not alter the validity of the federal statutory rights analysis articulated in *Mitsubishi* [and] *Green Tree*").

138. Then again, as this Article was going to press, the Missouri Supreme Court nullified a class arbitration waiver by finding that the *entire* arbitration clause in which it appeared was "extremely one-sided" and thus unconscionable. *See* Brewer v. Mo. Title Loans, No. SC 90647, 2012 WL 716878, at *7 (Mo. Mar. 6, 2012). Time will tell whether other courts also attempt to end-run *Concepcion* in this manner.

stepchild"—an "obviously inefficient constraint[] on market trades."[139] Nevertheless, economists concede that inalienability can prevent market failure caused by imperfect information, avoid negative externalities, and encourage positive externalities.[140] In addition, a rich non-instrumentalist literature has argued that inalienability is necessary to prevent the commodification of certain sacred things. In this Part, I bring these perspectives to bear on the statutory waiver rule and the vindication of rights doctrine.

A. Imperfect Information

Inalienability can prevent market failure that would otherwise occur because of informational defects.[141] Indeed, the main utilitarian justification for enforcing promises—that parties know which deals will make them better off—does not apply if one party lacks the knowledge necessary to make such an assessment.[142] Of course, no one ever possesses perfect information,[143] and most misunderstandings do not warrant state intervention.[144] Nevertheless, because informational flaws are a well-accepted source of market failure, commentators sometimes cite them as reason to adopt an inalienability rule.[145] For example, consumer, employment, and landlord–tenant law is littered with non-

139. Rose-Ackerman, *supra* note 35, at 931; *see* Radin, *supra* note 33, at 1851 (noting the commonly held view that "inalienable property rights are exceptional and problematic").

140. *See* Radin, *supra* note 33, at 1863 (stating that "inalienability is a means of controlling externalities that prevent the market from achieving an efficient result").

141. *See* Rose-Ackerman, *supra* note 35, at 939 (stating that because "markets also frequently work poorly because information is imperfect," market failure due to informational defects provides a rationale for inalienability rules").

142. *See, e.g.*, MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 102–03 (1993) (noting that "if at least one party inaccurately perceives or evaluates the impact of the exchange on her utility, we can no longer be confident that [it] will in fact render both parties better off").

143. *See id.* at 103 (stating that "[a]lmost no exchanges are entered into with absolutely perfect information by both parties").

144. *See id.* ("Even the purchase of the morning newspaper . . . on the assumption that it will contain an interesting film or restaurant review, when this assumption turns out to be false, reflects an exchange entered into with incomplete information.").

145. *See* Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 732 (2005) (discussing Rose-Ackerman's imperfect information explanation for a modified inalienability rule); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111 (1972) (citing instances where external costs, such as freeloader and informational costs, make limitations on the ability to engage in transactions more efficient); Rose-Ackerman, *supra* note 35, at 946–47 (stating that modified inalienability could be a response to quality control problems created by markets with imperfect information).

disclaimable rights and duties, from usury laws to warranties of habitability.[146] These rules protect vulnerable parties from harsh terms that they likely do not understand.

The statutory waiver rule and the vindication of rights doctrine may serve a similar purpose. After all, because of the widespread belief that adherents ignore dispute resolution terms in standard form contracts, there has been a long debate among legal academics about informational asymmetries and arbitration.[147] For instance, in a groundbreaking critique of the Court's FAA jurisprudence, David Schwartz claims that the statutory waiver rule levels the informational playing field between drafters and adherents.[148]

> When a party to a contract waives her rights to recover for future harm, particularly when this waiver is unilateral (as it typically is), strong reason exists to believe that some combination of unequal bargaining power and information underlies the agreement. In certain common adhesion contract situations, the weaker or adhering party is likely to be relatively uninformed about the likelihood or degree of potential harm for which she is waiving future remedies, and to underestimate the value of the rights forfeited.[149]

Although Schwartz was writing before the emergence of the vindication of rights doctrine, his argument applies with greater force to that arbitration-specific principle. The statutory waiver rule governs *express*

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146. *See* Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 207–09 (1998) (collecting examples).

147. *See* Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 710, 765–66; David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 57 (1997); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 798 (2004); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH U. L.Q. 637, 676–77 (1996); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 58–59 (1997). More broadly, scholars have asserted that it may be irrational for adherents to spend the time and energy necessary to understand standard form terms. *See* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243–44 (1995).

148. Schwartz, *supra* note 147, at 114.

149. *Id.*; *see also* Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 413 (2006) (arguing that adherents overlook the significance of "waiv[ing] rights that will become operative only upon the occurrence of a future event that is remote, uncertain, and often undesirable").

waivers of public law rights.[150] If a party cannot appreciate the gravity of such a clause, then she is even less likely to understand the effect of a one-sided arbitration provision that *implicitly* achieves the same result. Arguably, then, there are reasons to be especially concerned about informational defects at the crossroads of public law and arbitration.

Law and economics aficionados, however, have not been persuaded. Even if consumers and employees systemically undervalue their federal statutory rights, it does not necessarily follow that the market for these rights will malfunction.[151] Assume that an elite group of adherents actively seeks optimal terms: either "fair" arbitration clauses or "unfair" provisions that are accompanied by price reductions or higher wages. In a competitive market, drafters will need to cater to these "shoppers" to stay in business.[152] But because drafters cannot distinguish shoppers from the masses, they must offer one set of terms for all their customers. As a result, if shoppers' preferences are majoritarian—if they dovetail with what most consumers and employees want—then drafters will offer efficient arbitration clauses.[153] Now suppose that the informational critique of arbitration is exactly right: nobody reads the fine print, or searches for ideal arbitration clauses, or is even capable of detecting a link between a harsh provision and other, more-favorable terms. The market will push drafters in one direction: they will offer unfair arbitration clauses along with lower prices and higher wages.[154] After all, if adherents ignore dispute resolution terms, then they undoubtedly focus on price and wages, forcing drafters to compete on that level.[155] This will hold true no matter whether adherents "understand, or even notice, the arbitration clause";[156] indeed, it follows from the simple fact

150. *See supra* text accompanying notes 21–24.

151. *See* Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1072 n.39 (1977) (noting that customers have no problems finding other sellers).

152. *See id.*

153. *Cf.* Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1389–92 (1983) (analyzing the effect of consumer searching on the generation of optimal prices for all consumers); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 637–38 (1979) (same).

154. *Cf.* Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 760–61 (2011) (discussing how drafting parties allocate costs and gains between "salient terms" and "non-salient boilerplate"); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1212–16 (2003) (discussing how customers may place different values on price and warranty contract terms).

155. *See* sources cited *supra* note 153.

156. Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 92.

that "whatever lowers costs to businesses tends over time to lower prices" and raise wages.[157] Now, admittedly, we cannot be sure that this outcome is efficient: whether most adherents actually prefer fair terms or unfair terms with lower prices and higher wages is probably an unanswerable empirical question. Then again, if policymakers must guess, the idea that fully informed consumers and employees would rather have money in their pocket than retain the full rainbow of federal statutory rights seems plausible.

In addition, even for those who are less sanguine about the free market, there is another problem with linking the statutory waiver rule and the vindication of rights doctrine to informational flaws: the unconscionability doctrine does a better job at covering this terrain. To be sure, the federal law of arbitrability and unconscionability will always overlap. As noted above, the fact that a one-sided arbitration clause dilutes the plaintiff's rights can serve as the springboard for either a vindication of rights or an unconscionability challenge.[158] Technically, however, unconscionability is a superior tool for smoking out informational flaws. Indeed, the test for procedural unconscionability hinges on "overwhelming bargaining strength or use of fine print or incomprehensible legalese"[159] and, thus, isolates terms that adherents are likely to ignore or misunderstand. Conversely, the statutory waiver rule and the vindication of rights doctrine govern all parties (even corporations) and all contracts (including negotiated deals).

For example, the Court first endorsed the statutory waiver rule and the vindication of rights doctrine in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, a dispute between two companies.[160] And as noted above, in the *Amex* litigation, the Second Circuit allowed a group of medium-sized businesses to prove that they could not vindicate their antitrust rights without the class action device.[161] The court took pains to point out that it "in no way rel[ied] on the status of plaintiffs as 'small'

157. Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 255–56 (2006); *see also* IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union, 512 F.3d 989, 993 (7th Cir. 2008) ("As long as the market is competitive, sellers must adopt terms that buyers find acceptable; onerous terms just lead to lower prices.").

158. *E.g.*, Kristian v. Comcast Corp., 446 F.3d 25, 63–64 (1st Cir. 2006).

159. 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed. 2010).

160. 473 U.S. 614, 628 (1985).

161. *In re* Am. Express Merchs. Litig. (*Amex II*), 634 F.3d 187, 199 (2d Cir. 2011) , *rev'd*, 667 F.3d 204, 216 (2d Cir. 2012).

merchants."[162] Of course, even these examples—like many business-to-business transactions—can take the form of preprinted agreements foisted by a more "powerful" party upon another.[163] Yet outside of the consumer and employment settings, courts are much less concerned about informational defects and generally invalidate provisions only for outright fraud, duress, or mistake.[164]

Despite all this, there is a narrow way in which the statutory waiver rule and the vindication of rights doctrine dovetail with information-based theories of inalienability. Suppose the law and economic critique of standard form contracts is exactly right. It simply establishes that one-sided arbitration provisions save adherents *money*. But not all rights are commensurate with cash. As Guido Calabresi and A. Douglas Melamed note in their celebrated article, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, some entitlements simply "do not lend themselves to collective measurement which is acceptably objective and nonarbitrary."[165] This is a broader kind of information problem: it is not that the hustle of the contracting process prevents parties from properly valuing their rights, but that certain rights cannot be properly valued under any circumstances. For instance, the victim of a debilitating tort might recover damages, but she can never truly be compensated for her injuries. Bodily integrity is not fungible; it cannot

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162. *Id.* When the Second Circuit reaffirmed its holding in light of *Concepcion*, it repeated this point verbatim. *See In re* Am. Express Merchs. Litig. (*Amex III*), 667 F.3d 204, 219 (2d Cir. 2012) ("Our decision in no way relies upon the status of plaintiffs as 'small' merchants. We rely instead on the need for plaintiffs to have the opportunity to vindicate their statutory rights."). On the other hand, at least one court has declared that the vindication of rights doctrine "is premised on the contractual defense of adhesion." EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C., 448 F. Supp. 2d 458, 462 (E.D.N.Y. 2006).

163. *See, e.g.*, *Amex II*, 634 F.3d at 189–90 (describing the agreement all merchants must enter as a condition for accepting American Express credit cards in their transactions).

164. *See* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 151 (2005) ("[C]ourts and commentators often ignore bargaining power issues relating to parties outside stereotypically 'weak' categories.").

165. Calabresi & Melamed, *supra* note 145, at 1111. Admittedly, Calabresi and Melamed make this point in a different context: the difficulty of quantifying negative externalities (costs to third parties). *See id.* at 1111–12.

> If Taney is allowed to sell himself into slavery, or to take undue risks of becoming penniless, or to sell a kidney, Marshall may be harmed, simply because Marshall is a sensitive man who is made unhappy by seeing slaves, paupers, or persons who die because they have sold a kidney.

Id. at 1112. I discuss negative externalities in Part III.B. Yet the incommensurability of certain rights is not limited to the context of negative externalities; rather, it can undermine our confidence that the contracting parties will enter into deals that will actually make them better off.

be neatly packaged, weighed, and priced.[166] Similarly, consider workplace discrimination. Most people could probably name a sum for which they would agree to permit their employer to punish them for their immutable characteristics. It is tempting to think that such an exchange would improve their wealth, utility, or happiness. Yet that conclusion ignores the singularity of what it means to be treated with dignity. We value freedom from bias differently than we value cash.[167] Because these two things cannot be reduced to a common metric and compared, it is not entirely accurate to say the transaction makes one better off, worse off, or the same.[168]

The incommensurability critique reveals a simple way that courts could improve the vindication of rights doctrine: by linking the intensity of judicial review to the specific federal statute at issue. Currently, when courts decide whether an arbitration clause thwarts a plaintiff's rights, they apply a single, fixed standard that does not fluctuate with the nature of the plaintiff's claim. For instance, as discussed above, many jurisdictions require plaintiffs to introduce concrete, compelling evidence that they are priced out of arbitration—no matter whether the plaintiff alleges violations of the Truth in Lending Act (TILA) or Title VII.[169] This one-size-fits-all approach glosses over the fact that TILA and Title VII serve fundamentally different purposes: the former protects against financial loss while the latter safeguards civil rights that are incommensurable with money.[170] It makes sense to conclude that most plaintiffs would prefer to have extra cash up front than retain their TILA

166. *See* RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1977) ("The sensations caused by harm to the body or by pain or humiliation are not in any way analogous to a pecuniary loss, and a sum of money is not the equivalent of peace of mind.").

167. *See* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 784 (1994) ("Different kinds of valuation cannot without significant loss be reduced to a single 'superconcept,' like happiness, utility, or pleasure.").

168. Perhaps for this reason, courts seem more confident that civil rights, rather than other entitlements, are inalienable. *See* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 617 (9th Cir. 1988) ("Allowing the waiver of Title VII rights through covenants in employment contracts would undermine Title VII's policy of eradicating discrimination in employment."); Heurtebise v. Reliable Bus. Computers, 550 N.W.2d 243, 257 (Mich. 1996) ("[A]n employee's substantive civil rights are not for sale."); 1 BRUCE ACKERMAN, WE THE PEOPLE 64 (1991) ("[T]here are some things workers shouldn't be forced to bargain about—like an employer's demand that he or she endure racial or sexual subordination . . . .").

169. *See, e.g.*, Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 557 (4th Cir. 2001).

170. *See* 15 U.S.C. § 1601(a) (2006) (identifying Congress's intent to protect consumers in credit transactions under TILA); Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009) (identifying "the important purpose of Title VII—that the workplace be an environment free of discrimination, where race is not a barrier to opportunity").

rights. But as I have argued, it does not follow that anyone is better off when they earn more but suffer discrimination. Relaxing the vindication of rights burden for anti-discrimination plaintiffs—requiring less proof that arbitration thwarts their rights—could accommodate this concern.

In sum, courts often employ the vindication of rights doctrine in situations that involve information imbalances. Yet in this context—one-sided arbitration clauses in consumer, franchise, and employment contracts—the vindication of rights doctrine adds nothing to the unconscionability defense. Moreover, because the vindication of rights doctrine also governs brokered deals between relative equals, it does not seem like a response to imperfect information.[171] Nevertheless, I have argued that the rule can be justified on the grounds that some federal statutes protect rights that are incommensurable with money. I now consider a related possibility: that the doctrine is animated by the need to prohibit negative externalities or encourage positive externalities.

B. Externalities

Inalienability can also prevent negative externalities (costs imposed by the transacting parties on third parties) or facilitate positive externalities (benefits conferred by the contracting parties on third parties).[172] In this Part, I argue that prospective waivers of some federal statutory rights cause negative externalities. Yet I also show that the relationship between federal arbitrability principles and externalities is more complex than some courts and scholars have assumed.

To understand the concept of negative externalities, consider a simple example: a landowner is deciding whether to sell a parcel in a residential area to a notorious polluter who intends to build a factory on the site.[173] Even if the polluter is the high bidder, this may not be an efficient result. For instance, the detriment to the neighbors may outweigh the value of the transaction to the putative contractors. As a result, the neighbors have incentives to band together and offer a higher price than the polluter. Yet this result depends on collective action, which is unlikely. Without a way to prevent free-riding, not every

171. *See supra* text accompanying notes 160–62.

172. *See, e.g.*, Calabresi & Melamed, *supra* note 145, at 1089; Radin, *supra* note 33, at 1863; Rose-Ackerman, *supra* note 35, at 938.

173. *Cf.* Rose-Ackerman, *supra* note 35, at 938–39 (using a similar example).

affected neighbor will pitch in. Thus, the only way to achieve the best result may be to restrict the way the land can be sold or exploited.[174]

Long before arbitration became pervasive, courts purported to apply the statutory waiver rule to avoid negative externalities (although they did not use the phrase "negative externalities"). For instance, in *Fox Midwest Theatres v. Means*, decided in 1955, the Eighth Circuit held that a settlement agreement could not absolve film producers from liability for future antitrust violations.[175] Because antitrust laws are vital to preserving competitive markets, the court reasoned that such a release "would have impact, not simply between the parties, but upon the public as well."[176] More recently, in *Cange v. Stotler & Co.*, the Seventh Circuit opined that a prospective waiver of rights under the Commodity Exchange Act would be invalid "[b]ecause Congress viewed [the statute] as 'critical to protecting the public and . . . maintaining the credibility of the futures market.'"[177] By seeking to prevent harm to parties outside of the contractual relationship, these courts attempted to avoid negative externalities.

Likewise, judges and scholars sometimes link the vindication of rights doctrine to negative externalities. For instance, David Schwartz has argued that robust judicial review of one-sided arbitration provisions prevents "harm to persons affected by, but not party to, the contract."[178] According to Schwartz, enforcing arbitration clauses that are the functional equivalent of waivers of statutory rights would lead to a kind of private race to the bottom.[179]

> Because employment agreements, for example, are patterned and repetitive, a prospective waiver provision in an employment

174. *See id.*

175. 221 F.2d 173, 180 (8th Cir. 1955).

176. *Id*. Antitrust cases feature an additional component that may make them *sui generis*. The Sherman Act prohibits contracts "in restraint of trade." 15 U.S.C. § 1 (2006). Arguably, then, a settlement, release, or arbitration agreement that waives liability for future violations of the Sherman Act is *itself* a "contract 'in restraint of trade.'" *Fox Midwest Theatres*, 221 F.2d at 180. Perhaps for this reason, courts seem to apply the statutory waiver rule vigorously in the antitrust context. *See, e.g.*, Redel's Inc. v. Gen. Elec. Co., 498 F.2d 95, 99 (5th Cir. 1974); Gaines v. Carrollton Tobacco Bd. of Trade, Inc., 386 F.2d 757, 759 (6th Cir. 1967).

177. 826 F.2d 581, 595 (7th Cir. 1987) (quoting H.R. REP. NO. 97-565, pt. 1, at 56–57, *reprinted in* 1982 U.S.C.C.A.N. 3871, 3905–06)). *But see id.* at 596 (Easterbrook, J., concurring) ("Private bargains are subject to attack if enforcement would do too much damage to the statutory system, but this is rare and not a ground to refuse to enforce contracts generally . . . . Contracts rarely defeat the function of the statute so utterly that they may be set aside.").

178. Schwartz, *supra* note 147, at 114.

179. *Id.* at 114–16.

> contract will not be an isolated event between an employer and a single employee, but will tend to be standardized. If employers presented prospective waivers of Title VII rights as part of "take it or leave it" agreements and turned away prospective employees who refused to sign the provision on the assumption that they could always find someone else who will sign, then the price of discrimination decreases. This occurs because prospective employees, in effect, "underbid" competing job applicants when they willingly devalue their right to statutory protection from discrimination.[180]

Similarly, recall that in *Morrison v. Circuit City Stores, Inc.*, the Sixth Circuit broke ranks with other courts and held that cost-splitting provisions violate the vindication of rights doctrine when they erode the "deterrent effect" of federal law.[181] The court's preoccupation with the public interest in the enforcement of federal statutes is a direct descendant of the anti-negative externality reasoning in *Fox Midwest Theatres*.[182]

As these decisions suggest, many federal statutes do, in fact, have significant public dimensions; thus, prospective waivers of claims under these laws impose costs on third parties. Antitrust regulation, for example, ensures that markets remain competitive; in turn, because commercial niches are tightly entwined, collusion in one industry very well might spill over and impact another industry. Likewise, securities fraud arguably "reduces investors' confidence in the economy; creates inaccurate pricing signals, facilitating the misallocation of capital; and reduces the efficiency of incentive structures that govern, for example, takeovers and executive compensation."[183] Thus, in these contexts, the statutory waiver rule and the vindication of rights doctrine can be justified on instrumentalist grounds.

In addition, the need to avoid negative externalities explains why some courts have refused to allow defendants to cure onerous arbitration clauses by waiving harsh terms or paying the plaintiff's costs.[184] Suppose Barry and Carla work at Company *A*, and their employment contracts contain an arbitration clause that requires them to pay a $1000

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180. *Id.* at 115–16; *see also* Estlund, *supra* note 149, at 412 (arguing that one-sided arbitration clauses "compromis[e] the public interest in enforcing the substantive . . . rights at issue").

181. 317 F.3d 646, 663 (6th Cir. 2003) (en banc).

182. *See supra* text accompanying note 176.

183. Robert Allen, Comment, *Securities Litigation as a Coordination Problem*, 11 U. PA. J. BUS. L. 475, 493 (2009).

184. *See supra* notes 111–14 and accompanying text.

deposit. Barry sues Company *A* and proves that he cannot afford the deposit. If a judge strikes down the clause, Company *A* will reduce or eliminate the deposit requirement.[185] But if a judge simply permits Company *A* to pay Barry's deposit, Company *A*'s rights-thwarting arbitration clause will remain in effect. In turn, this transaction between Barry and Company *A* will harm Carla, who will not be able to bring a claim against Company *A* without overcoming a substantial initial roadblock. Prohibiting these deals between litigants and drafters thus prevents spillover costs.

In other contexts, however, it is not clear that the statutory waiver rule and the vindication of rights doctrine prevent negative externalities. When courts and scholars speak of the vindication of rights doctrine maintaining "the deterrent functions" of federal laws,[186] they are often protecting other signatories to the *same contract* (not third parties). Return to the hypothetical situation above with Company *A*'s $1000 arbitral deposit. If this provision means that Barry is less likely to pursue an employment discrimination claim against Company *A*, then it also means that Susan, a supervisor at Company *A*, may be more prone to engage in wrongdoing. But to cause a negative externality—to inflict harm on others—the cost-splitting provision would need to make *other companies* more likely to discriminate. It does not. Companies *B*, *C*, and *D*'s incentives to prevent discrimination have nothing to do with Company *A*'s employment contract.

True, if Susan is more likely to discriminate against Barry, then she is more likely to discriminate against Carla. In that sense, the cost-splitting provision in Barry's contract does affect non-signatories: his co-workers. But these individuals are often locked into the same cost-splitting provision. Recall the argument that one-sided arbitration clauses allow drafters to pay their employees more.[187] If this is true, then Carla is not a passive "third party" with respect to the cost-splitting provision in Barry's contract. She is not like a landowner who gains nothing from the construction of a nearby factory. Instead, she has already reaped the benefits of Barry's cost-splitting provision in the form of higher wages. Like all Company *A* employees, she internalizes not just the burdens—but also the advantages—of the same mass contract.

185. *See generally* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605 (2010) (discussing the frequency with which companies have amended their arbitration provisions in response to judicial rulings).

186. *Morrison*, 317 F.3d at 661.

187. *See supra* text accompanying notes 151–57.

For this reason, it is not clear that cost-splitting clause causes negative externalities.

This slippery issue often surfaces in cases involving class arbitration waivers.[188] Recall that the main objection to these provisions is that they shield the drafter from numerous low-value claims: no consumer will pursue, say, a $5 overcharge claim against a bank unless she can do so on a class basis.[189] As a result, class arbitration waivers eliminate the specter of aggregate liability and allow companies to flout the law.[190] Yet under the law and economics view of adhesion contracts, this self-deregulation permits firms to charge their consumers less and pay their employees more. It may be objectionable for many reasons, but it is difficult to classify as a negative externality.

The briefing in *AT&T Mobility v. Concepcion* illustrates that the defense bar has recognized the mutability of cost–benefit calculation in the context of mass contracting.[191] AT&T laced its class arbitration waiver with bounties for plaintiffs who arbitrated on an individual basis, promising to pay $7500 and double attorneys' fees to any such plaintiff who recovered more than its last written settlement offer.[192] A California district court and the Ninth Circuit invalidated the clause, reasoning that even if it made individual plaintiffs whole, few consumers would sue, and the clause would slash AT&T's liability.[193] In its merits brief at the Supreme Court, AT&T attacked this logic. According to AT&T, the courts below improperly considered the costs that the waiver imposed "on non-parties to the litigation"—the millions of consumers who would never even learn that AT&T had committed wrongdoing without the class action device—rather than focusing narrowly on the Concepcions.[194] But in a spectacular whipsaw, AT&T's *amici* accused the lower courts of the opposite sin: not crediting the fact that the waiver benefitted all AT&T customers by lowering the "price[] of goods and services."[195] Together, the briefs exploited the feedback loop at the intersection of adhesion contracts and negative externalities: costs

188. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

189. *See supra* text accompanying notes 120–23.

190. *See supra* text accompanying notes 120–23.

191. 131 S. Ct. 1740.

192. *Id.* at 1744.

193. *Id.* at 1745.

194. Brief for Petitioner at 36, *Concepcion*, 131 S. Ct. 1740 (No. 09-893).

195. Brief for DRI—The Voice of the Defense Bar as *Amicus Curiae* in Support of Petitioner at 11, *Concepcion*, 131 S. Ct. 1740 (No. 09-893).

imposed on other signatories to the same mass contract are not costs at all; in fact, they are benefits.

In addition to preventing negative externalities, inalienability can also steer owners toward using property in a socially advantageous manner. Susan Rose-Ackerman cites the nineteenth century Homesteading Acts as an example of this phenomenon.[196] The Homesteading Acts allowed settlers to purchase frontier land at a heavy discount after they had worked it for five years.[197] These statutes forbade settlers from selling their plots during this initial period—a restriction that guaranteed that the land would, in fact, be farmed.[198] Although this mandate removed a stick from the bundle of rights, it also made each bundle more robust: the value of a particular tract increased as each surrounding tract was cultivated.[199] Thus, the Homesteading Acts are examples of "network effects": the phenomenon that certain things become more valuable when they are widely and uniformly used.[200] The classic example of a network effect is a telephone, which is worthless unless many other people also own telephones.[201] In some situations, such as the Homesteading Acts, the state can only reap the positive externality of network benefits if it first restricts property rights.[202]

Similarly, prohibiting parties from waiving future public law causes of action generates a positive externality: case law. Precedent is a network benefit—a steady diet of reported opinions makes courts and lawyers more dexterous with legal concepts and fact patterns.[203] Because

196. *See* Rose-Ackerman, *supra* note 35, at 957–59.

197. Enlarged Homestead Act of 1909, ch. 160, 35 Stat. 639 (repealed 1976); Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed 1976).

198. *See* Rose-Ackerman, *supra* note 35, at 958.

199. *See* Abramowicz, *supra* note 145, at 733 n.156 (explaining that as each tract was settled, neighbors enjoyed "assistance in emergencies, sharing of labor and equipment, and population concentration that permitted greater political and economic power").

200. *See id.* at 732–33.

201. Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 725 n.31 (1997).

202. *See* Rose-Ackerman, *supra* note 35, at 958 (suggesting that the benefits of network effects will accrue if states "impose a conditionally coercive entitlement rule designed to encourage settlement").

203. *Cf.* David Horton, *Flipping the Script:* Contra Proferentem *and Standard Form Contracts*, 80 U. COLO. L. REV. 437, 479 (2009) (discussing the network benefits of standardized form contracts); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 761 (1995) (same); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1594–95 (1998) (same). Standardized contract terms "mak[e] lawyers and other providers of legal services more facile in drafting, negotiating, interpreting, and, if need be, litigating the term." Korobkin, *supra*, at 1595.

this information makes it easier for plaintiffs with righteous claims to prevail, it increases the value of those claims. Moreover, precedent allows voters, regulators, and lawmakers to monitor the development of the public laws. For instance, Kevin E. Davis and Helen Hershkoff argue that contract procedure—the alteration of procedural rules by private agreement—reduces governmental transparency.[204] They provide a specific example in the context of provisions that limit discovery:

> [A] large body of literature emphasizes the importance of full discovery to judicial decisions in such areas of the law as employment discrimination and consumer protection, in which claims, legal theories, and evidentiary proofs cannot be developed without a rich factual base. Similarly, commentators point to the relevance of tort actions for improving federal agency policymaking by encouraging the disclosure of information. In other words, certain forms of contract procedure may reduce the quality and effectiveness of regulation, a significant potential social cost.[205]

Although Davis and Hershkoff limit their discussion to contractual terms that alter procedural rules in court (rather than in arbitration),[206] one might attempt to use their analysis to support a positive externality-based justification for the statutory waiver rule. Without the doctrine, far fewer statutory disputes would reach the courts, shielding Congress's handiwork from the public eye.

Then again, precedent requires litigation, and litigation has a dark side: it soaks up the resources of parties and courts. Rightly or wrongly, our civil justice system has decided that these social costs dwarf the benefits of precedent. For instance, we strongly encourage settlement, despite the fact that it stunts the flow of judicial decisions.[207] Likewise, the Supreme Court's "liberal federal policy favoring arbitration"[208]

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204. Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 544–46 (2012).

205. *Id.* at 545–46. Conversely, other commentators have claimed that parties should have wide leeway to modify the rules of litigation. *See* Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 464 (2007); Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts To Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 646 (2007).

206. *See* Davis & Hershkoff, *supra* note 204, at 552 (calling arbitration a "more radical form[] of exit" from "the public rules of procedure").

207. *See* St. Louis Mining & Milling Co. v. Mont. Mining Co., 171 U.S. 650, 656 (1898) ("[S]ettlements of matters in litigation or in dispute without recourse to litigation are generally favored."). *But see* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–86 (1984) (arguing that courts do not simply resolve disputes between parties, but also articulate social norms).

208. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

reflects a policy determination that the speed and informality of extrajudicial dispute resolution outweigh the virtues of reported opinions. Given this backdrop, it would be anomalous if the main purpose of the statutory waiver rule was to shunt disputes *into* litigation. These factors may explain why Davis and Hershkoff limit their paper to contractually modified litigation rules *in court*.[209] Both arbitration and privately tailored court processes distort the signals that voters and lawmakers receive about the substantive law.[210] Yet, as noted above, arbitration also boasts powerful tradeoffs: it reduces the burden on the parties and the judiciary.[211] Conversely, when parties adopt unique procedural principles—but remain in court—they do not tap into those benefits. In fact, by forcing judges to comply with idiosyncratic rules, they likely increase the strain on the court system.

In sum, the need to avoid negative externalities provides some support for the statutory waiver rule and the vindication of rights doctrine. In other contexts, however, the very parties that these principles purport to protect also benefit from one-sided arbitration clauses, complicating the matter. Accordingly, in the next section, I analyze the federal law of arbitrability through a different rationale for inalienability: non-commodification theory.

C. Non-Commodification

Outside of the domain of economic analysis, scholars have defended inalienability on the ground that it prevents commodification.[212] These diverse perspectives revolve around the same rough idea: sometimes, to permit the sale of a cherished thing would change the thing itself. In this Part, I argue that similar concerns animate the statutory waiver rule and the vindication of rights doctrine. These principles help preserve the distinctive character of public lawmaking in an era where private parties wield legislative-like power.

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209. *See* Davis & Hershkoff, *supra* note 204, at 510–16.

210. *See id.* at 550 (noting concerns about "[t]he effects of contract procedure on the quality of the political process").

211. This is not to say that I believe that these benefits outweigh the costs of arbitration (at least in the consumer and employment settings). As I have discussed in a previous article, rampant private procedural rulemaking through arbitration clauses in adhesion contracts raises the very transparency concerns that Davis and Hershkoff cite. *See* David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 480–81 (2011).

212. *See generally* Radin, *supra* note 33.

The port of departure for non-commodification theory is Margaret Radin's article, *Market-Inalienability*.[213] Radin claims that inalienability can help preserve human flourishing.[214] As she notes, even speaking about highly personal objects or attributes in market rhetoric can be damaging.[215] For instance, some economists explain the criminalization of rape as an effort to preserve the "marriage market."[216] Yet, as Radin argues, this language takes a small step toward normalizing rape: it conceives of bodily integrity as detached and fungible—something that can be invaded if the benefits outweigh the costs.[217] This is problematic because of what Radin calls the "domino effect": "once market value enters our discourse, market rhetoric will take over and characterize every interaction in terms of market value."[218] For instance, if prostitution were legal, the open commodification of sex—lurid billboards and cold discussions about the price of intimacy—would alter "our very conception of sexuality and our sexual feelings."[219] Radin thus proposes that things that are closely entwined with personhood should remain inalienable.[220]

More importantly for my purposes, scholars have also invoked the non-commodification norm to explain the inalienability of certain civic rights and responsibilities. For instance, the meaning of "citizenship" would change if individuals could pawn off jury duty or compliance with the military draft.[221] Likewise, Cass Sunstein has argued that "core vote buying" (paying people to cast ballots a certain way) would transform our "conception of what voting is for—about the values that it embodies—and this changed conception would have corrosive effects on politics."[222] Similarly, Rick Hasen has considered the slightly narrower issue of whether candidates may offer incentives to increase voter

213. *See generally id.*

214. *See id.* at 1851.

215. *See id.* at 1877–78.

216. *Id.* at 1879.

217. *Id.* at 1880–81.

218. *Id.* at 1914.

219. *Id.* at 1923.

220. *Id.* at 1908–09; *cf.* Coyote Pub., Inc. v. Miller, 598 F.3d 592, 604 (9th Cir. 2010) (finding that Nevada had a "substantial" interest "in preventing the commodification of sex" and thus rejecting constitutional challenge to the state's prohibition on advertising by brothels).

221. *See* Rose-Ackerman, *supra* note 35, at 961–68 (discussing the effects of making jury duty and compliance with the military draft alienable).

222. Sunstein, *supra* note 167, at 849.

turnout.[223] Hasen notes that such a scheme would have a tendency to alter the very definition of voting:

> The vote, which tens of thousands gave their blood and sweat to secure, is not a commodity that ought to be crassly traded for cash in the political marketplace.
>
> The concern here is that payments for turnout, whether directed to all voters or targeted only at voters in certain areas, brings a money calculation into the picture in much the same way as core vote buying. It tells us that voting might be for getting a discounted ham, and not for choosing the best leaders.[224]

Likewise, allowing the pre-dispute sale of federal statutory rights would have a caustic influence on politics. Although money plays a huge role in elections, we shield the actual casting of ballots—the core input of the democratic machinery—from the market.[225] As a result, it makes sense to create a buffer zone around legislation, the primary output of this process. And like Radin's domino effect or Sunstein and Hasen's concern about corrosion, enforcing prospective waivers of federal statutory rights would transform congressional lawmaking into something else. It would allow drafters to prevent public laws from ever taking root. This would change federal statutes into mere default rules: the functional equivalent of private law. In turn, this false parity between the two spheres would cause us to lose sight of public law's unique dimensions.

For one, public law has a pedigree that private law does not. Bicameralism and presentment condition the passage of a statute on approval by both chambers of Congress and the President: representatives who serve diverse constituencies.[226] This de facto super-majoritarianism requirement diminishes the risk of capture by a single, powerful interest.[227] Moreover, we generally assume that public servants attempt, at least in part, to further their conception of the common

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223. *See* Hasen, *supra* note 34, at 1356–59 (discussing the advantages and disadvantages of paying for voter turnout).

224. *Id.* at 1358.

225. *Id.* at 1368–71.

226. U.S. CONST. art. 1, § 7.

227. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 233–48 (1962) (discussing the effects of a bicameral legislature); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1557 (1990) ("Bicameralism forces majorities to seek broader coalitions. It imposes something like a supermajority voting rule.").

good.[228] In stark contrast, drafters of adhesion contracts—powerful interests incarnate—seek to advance their own agendas. As a result, we generally deny private parties the ability to make law.[229] It would be anomalous if we allowed them to *un-make* law.

To be sure, in other contexts, we encourage private parties to participate in governance. Standard-setting organizations promulgate regulations and companies work in tandem with the state to deliver services under entitlement programs.[230] Law reform projects such as the Uniform Commercial Code or Uniform Trust Code are drafted by lawyers and then presented for legislative approval.[231] Industries such as cattle ranching and diamond selling often create "order without law" through norm-based dispute resolution systems.[232] In these examples, however, the government and private parties share the same goals. Conversely, a drafter who inserts a prospective waiver of statutory rights into a contract has interests that are directly antagonistic to the state. Because boilerplate is a kind of contagion, enforcing such a term would cause it to spread, blurring the line between public and private power.

In addition, equating public and private law would destroy the expressive function of legislation. Statutes do not just govern citizens. Instead, they "communicate[] social values" and "thereby change behavior."[233] For instance, seatbelt laws and non-smoking ordinances

228. *See* RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 1 (1973). Even public choice theorists, who believe that members of Congress are primarily motivated by a desire for re-election, generally concede that they also seek to enact sound policies. *See* Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1287–88 (2001); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 31 (1991).

229. *See* Horton, *supra* note 211, at 473–80. Alan Rau, a scholar whose work I greatly admire, dismisses similar concerns in a forthcoming article. Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 23 AM. REV. INT'L ARB. (forthcoming 2012) (manuscript at 76), *available at* http://ssrn.com/abstract=1938565. Rau notes that "to enter into a contract is to engage in lawmaking—but that has been well understood since the time, say, of Napoleon." *Id.* He rejects this view as "largely metaphor[ical]." *Id.* at 76 n.289. I disagree. A class arbitration waiver like AT&T's, which governs 70 million customers—more than the combined populations of California, New York, and Illinois—is an exercise of power so vast that it is *literally* a kind of private legislation. *See, e.g.*, Coneff v. AT&T Corp., 620 F. Supp. 2d 1248, 1252 (W.D. Wash. 2009), *rev'd*, 673 F.3d 1155 (9th Cir. 2012); *State & County Quick Facts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states (last visited July 6, 2010).

230. *See, e.g.*, Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000).

231. Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77, 79 (2009).

232. *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

233. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General*

have helped people reconsider even deeply entrenched habits.[234] Likewise, banning insider trading or racial discrimination is a singular way to stigmatize wrongdoing, as "people's views of the acceptability and even morality of those actions change."[235] At the opposite pole, commentators have credited the Americans with Disabilities Act with altering disabled persons' identities by highlighting the contributions they make to the workforce.[236] Allowing federal law to be eclipsed by private agreement would narrow its scope and thus imperil its ability to shape norms. It would also undermine the very idea that public law is expressive by deeming it to be fungible with private law, which we do not think of as expressive.

Finally, enforcing prospective waivers of federal statutory rights would ignore the relationship between regulation and the market. Often, Congress legislates because private ordering has failed to bring about a certain result. Antidiscrimination laws, for instance, remedy the fact that "[t]he labor market, operating freely, had not and would not provide fair employment opportunities for women, racial, ethnic and religious minorities, and older and disabled individuals."[237] Mandatory securities disclosures exist because "market forces are inadequate to produce the socially optimal supply of research."[238] Antitrust statutes forbid anticompetitive conduct.[239] Because these laws are intended to constrain

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Restatement, 148 U. PA. L. REV. 1503 (2000); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1652 (2000); Maggie Wittlin, Note, *Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law*, 28 YALE J. ON REG. 419, 420 (2011). *But see* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

234. *See* Wittlin, *supra* note 233, at 422 (proving that the first wave of mandatory seatbelt laws caused seatbelt use to rise even in jurisdictions that imposed no sanction for violating the law or had not yet adopted such a law); *see also* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2033–36 (1996) (discussing smoking).

235. Robert Prentice, *Whither Securities Regulation? Some Behavioral Observations Regarding Proposals for Its Future*, 51 DUKE L.J. 1397, 1502–03 (2002).

236. Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 VA. L. REV. 1151, 1173 (2004) (reviewing DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES (2003)).

237. Angela K. Herring, Comment, *Untangling the Twombly-McDonell Knot: The Substantive Impact of Procedural Rules in Title VII Cases*, 86 N.Y.U. L. REV. 1083, 1086 (2011).

238. John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 728 (1984).

239. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885–86 (2007) (discussing the Sherman Act's role of targeting restraints of trade "with anticompetitive effect that are harmful to the consumer").

market participants,[240] it would be perverse to trust the market with these laws. Indeed, there is no reason to think that an after-the-fact market for statutory rights would not suffer from the same infirmities that inspired the regulation in the first instance. Thus, permitting the pre-dispute sale of federal statutory rights would prescribe the disease as cure.

Of course, not all regulation is wise, and private decision-making is often superior to its public counterpart. Moreover, congressionally created rights can be under-enforced or entrusted to unworthy or incompetent plaintiffs. My point is simply that if private parties can erase federal statutes through the mechanism of mass contracting, then federal law ceases to be federal law. It becomes something cheaper: a state-produced version of the same boilerplate that appears in credit card statements, car rental contracts, or end-user license agreements. The statutory waiver rule acts as a gate at the top of this slippery slope. It helps preserve a role for public law in light of the massive rise of private power.

For these reasons, judges should be especially suspicious of arbitration clauses that try to rewrite Congress's handiwork. A rough proxy for this phenomenon should be whether a provision overrides some aspect of a statutory scheme and yet does not serve any arbitration-related purpose. Cost-splitting provisions would be an example of a term that is not objectionable under this rubric. Although these clauses alter a background assumption under which Congress legislates—that plaintiffs will be able to pursue statutory claims in the publicly subsidized court system—they are logically related to extrajudicial dispute resolution. After all, someone needs to pay the private judge. But pay-your-own-way and loser-pays clauses are more troubling. Pay-your-own-way provisions override federal statutes that expressly empower successful plaintiffs to recover their attorneys' fees, and loser-pays terms reverse the American rule. At the same time, they are naked attempts to deter claims: they have no relationship whatsoever to the uniqueness of the arbitral forum. Courts should not hesitate to nullify them when they conflict with the congressional blueprint for vindicating statutory rights.

IV. CONCLUSION

At the beginning of this Article, I introduced Kate, a Title VII claimant, and asked whether a court should enforce her former

240. *See id.*

employer's arbitration clause despite its cost-splitting, loser-pays, pay-your-own-way, and anti-class action provisions. Courts currently disagree over how to assess whether these terms thwart a plaintiff's federal statutory rights. I have argued that they can better understand the stakes by conceptualizing the vindication of rights doctrine and its underlying principle, the statutory waiver rule, as a species of inalienability. For one, they should recognize that the efficiency rationale for enforcing adhesive arbitration clauses applies with less force to claims like Kate's, which seek redress for the violation of rights that are incommensurable with money. In addition, they should be particularly suspicious of loser-pays and pay-your-own-way provisions, which—unlike cost-sharing terms—have no relationship to the arbitral process. Allowing drafters to rewrite Congress' handiwork through these terms aggrandizes private parties and undermines the rule of law.